HISTORY

OF THE

ORR EWING CASE;

WITH

VERBATIM REPORT OF THE OPINIONS OF THE FIRST DIVISION JUDGES,

AND NOTES ON THE

CONFLICT BETWEEN ENGLISH AND SCOTCH JURISDICTION, AND THE REMEDY

BY

WALTER COOK SPENS, ADVOCATE,
SHERIFF-SUBSTITUTE, GLASGOW.


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These Pages

ARE RESPECTFULLY INSCRIBED

TO THE

RIGHT HON. W. E. GLADSTONE, M.P.,

FIRST LORD OF THE TREASURY,

AS A MEMBER OF A SCOTCH CONSTITUENCY,

IN THE HOPE

THAT HE MAY CONSIDER THE NATIONAL GRIEVANCE COMPLAINED OF,

AND, IF CONVINCED OF INJUSTICE,

SEE TO ITS REDRESS.

PREFATORY NOTE.

THIS pamphlet professes to be little more than a compilation. The history of the Orr Ewing case is, of course, simply a report of the different stages of the English and Scotch cases, which I have endeavoured to make as concise as possible consistently with enabling the conflicting views of the Judges to be distinctly understood; with this exception, however, that although a considerable portion of the opinions of the Judges of the First Division of the Court of Session is concerned with facts previously detailed, I still thought it would add to the interest of these pages to print them *in extenso*. For the verbatim report I am indebted to Mr. Beith, W.S. The main object of the pamphlet is to present in a concise and portable form at the same time the Orr Ewing case, in connection with the conflict of jurisdiction, and the position of Scotland with regard to the assumed jurisdiction of the English Courts in the issuing of writs against Scotchmen. It is in this view that I hope the pamphlet may be of use to Members of Parliament, the Legal Profession, and the General Public,—inclusive of, and more especially, the Mercantile Community. I am indebted to various memorials and memoranda prepared by legal bodies throughout the country, which are referred to in this Essay; and also, for information and assistance, to Sheriff Guthrie; Mr. David Lang, advocate; and Messrs. T. C. Young, jun., Borland, and Spens of the Glasgow Faculty of Procurators.

W. C. S.

5th March, 1884.

THE HISTORY

OF

THE ORR EWING CASE.

THE Orr Ewing case has succeeded in obtaining the dubious distinction to the parties interested of being a *cause célèbre* among *causes célèbres*. There is a direct conflict between English and Scotch jurisdiction with reference to the administration of an estate of which, at the date of the testator's death, admittedly only one-eighteenth was situated in England. Although there has been very general interest excited by the case, and the latest extra-Parliamentary utterances of Scotch Members of Parliament have all had reference to the subject, it is not, I think, perfectly understood how the question arose, and the details of the different aspects of this many-phased case are not familiar to the public. It will be of general interest to give a history of the case from the beginning, quoting the more interesting and pregnant passages in the opinions of the Judges who have had the case before them. It will be my object to present the case, so far as possible, in a purely narrative form, free of legal technicalities, and carefully to abstain from argument in the matter, the question being still one *sub judice*, because no doubt the trustees will be compelled under threat of imprisonment to appeal the case to the House of Lords.

John Orr Ewing died on the 15th day of April, 1878, leaving a trust-disposition and settlement dated 17th November, 1876, with codicils of date 16th November, 1877, and 15th January, 1878. In this deed the testator assigned and disposed his whole estate to and in favour of his brothers, William Ewing, merchant in London; Archibald Orr Ewing of Ballikinrain, merchant in Glasgow, and

Member of Parliament for the county of Dumbarton ; and James Ewing, merchant in London, and presently residing there ; and to William Ewing Gilmour, his nephew, and Henry Brock, partners of the firm of Messrs. John Orr Ewing & Co., turkey-red dyers and manufacturers, Glasgow ; and Alexander B. M'Grigor, writer in Glasgow, as trustees for the purpose of the trust-settlement. By this settlement he, *inter alia*, left to the children of his brother James (1) a special legacy of £60,000 ; (2) the whole residue of his estate equally among them.

An inventory was given up in the Commissariot of Dumbartonshire, and Sheriff Gloag, on the 18th of May, 1878, confirmed the nomination of executors contained in the said disposition and settlement. The whole estate in the United Kingdom, as given up in that inventory, amounted to £460,549, 10s. 4d., of which there was situated in England £24,830, and in Scotland some £435,000.

At the date of the death of the deceased, James Ewing, the testator's brother, one of the trustees, had six sons alive—namely, William Ewing, the younger ; Archibald Orr Ewing, the younger ; John Orr Ewing and Hugh Moody Robertson Ewing (who had all attained the age of twenty-one years on the 9th of April, 1881, when the statement of claim was presented to the Court of Chancery), James Robert Ewing, and Malcolm Hart Orr Ewing—the last named of whom, the youngest, is now seventeen or eighteen years of age. William Ewing, the younger, died in India on the 26th December, 1878. By the terms of the testator's will he had power to test on the share of the estate falling to him. He bequeathed the sum of £30,000 to his stepmother, Sarah Jane Ewing, to be paid out of his share under the will of the deceased John Orr Ewing ; the sum of £10,000 to his friend, Mr. George Wellesley Hope ; and the remainder of his share under the will to be divided among his brothers. He also appointed his uncles, Messrs. Archibald Orr Ewing and William Ewing, the executors of his will, they being two of the trustees also under John Orr Ewing's settlement.

The first step taken in the litigation was the issue of a summons on 25th February, 1880, by the Court of Chancery, nominally at the instance of Hugh Moody Robertson Ewing, James Robert Ewing, and Malcolm Hart Orr Ewing, infants, by George Wellesley Hope, their next friend, and the said George Wellesley Hope also for himself, craving to have "an account taken of the personal estate of the testator, *and to have the same administered.*" Appearance was entered by all the trustees, and the Master of the Rolls was moved on 11th June, 1880, on behalf of the trustee "to inquire whether this action has been properly instituted, and whether it will be fit and proper and for the benefit of the above-named infants that this action should be further prosecuted; and if this honourable Court should be of opinion that the action should be further prosecuted, then whether the said George Wellesley Hope is a proper person to be the next friend of the infant plaintiffs; and if he is not, that some proper person may be appointed as such next friend in his stead." Accordingly on that day the order to make such inquiry was made—I suppose as a matter of course—the remit being to the Chief Clerk. He reported on 20th January, 1881, that "this action has not been properly instituted, and it is not fit and proper and for the benefit of the infant plaintiffs that the same should be further prosecuted." This report of the Chief Clerk was brought before the Master of the Rolls, Sir George Jessel, who gave judgment on 21st March, 1881. He thought the action was one for the benefit of the last-named infant, Malcolm Hart Orr Ewing. As regarded Mr. Hope's personal claim, and all the other plaintiffs', who had themselves appeared and objected to the suit, he said:—

"In the first place I think the suit is badly framed. I think Mr. Hope ought not to have been made a plaintiff at all. He has no direct interest in the estate which is sought to be administered. He is, in fact, a legatee under a residuary legatee's will, and of course should not have been a co-plaintiff, and therefore must be struck out. Why it was not done before I do not know. He could not maintain the suit. There is another reason why he

should not be a co-plaintiff. It embarrasses the Court with reference to the next friend; if either at the present time or at some future time the Court wishes to change the next friend, it would not obtain the sole command of the suit, which it is desirable to do where suits are instituted on behalf of infants. Therefore for every reason it appears to me that Mr. Hope's name should be struck out. As regards the remaining plaintiffs, the one who has attained the age of twenty-one does not desire to prosecute the suit, which is not an unnatural thing. The other members of the family do not wish to maintain the suit even if they were to get some pecuniary advantage by it. The other plaintiff, who has attained his twentieth year, has made an affidavit. Considering his age and position, I think it only reasonable that he should be struck out also."

The action, however, being in the opinion of the Master of the Rolls for the interest of Malcolm Hart Orr Ewing, the same was able to be prosecuted at the instance of a "next friend," and the further question which had to be determined at this preliminary stage was whether it was proper that the plaintiff should be represented by Mr. Hope as his next friend. On this point the Master of the Rolls held in the affirmative.

Under this judgment, therefore, which became final, it was held competent for Mr. George Wellesley Hope, as next friend of the plaintiff, Malcolm Hart Orr Ewing, to proceed against the trustees. At this stage it may be well to point out more specifically what was the supposed interest of Malcolm Hart Orr Ewing. He was entitled to a portion of the specific legacy of £60,000, and also to a certain interest in the will of his deceased brother, William Ewing the younger. Further, he was under the deed of settlement entitled to a share of the residue. It is not, I think, generally understood that it was with reference to this share of the residue that the question came to be raised, and apparently could only be competently raised. In connection with the residue a challenge was made at the instance of those who acted for the plaintiffs in the suit in regard to the mode of calculating interest on the capital sum standing at Mr. John Orr

Ewing's credit in the books of the firm of John Orr Ewing & Co., which was afterwards settled by a separate action in Scotland, and carried to the House of Lords, but to which it is unnecessary to refer further, and the following were the cravings appended to the statement of claim, namely :—

"1. That the personal estate of the said testator might be administered, and that the trusts of his said will or testament and codicils thereto might be carried into execution, by and under the direction of the said Chancery Division of the said High Court of Justice in England. 2. That it might be declared that the defendants were jointly and severally liable to make good, and that they might be ordered to make good, to the said estate a loss alleged to have resulted or to be about to result thereto, by reason of their accepting certain discharges therein specified. 3. That accounts might be taken against the defendants upon the footing of wilful default. 4. That for these purposes all necessary and proper accounts might be taken, directions given, and inquiries made; and 5. For such further or other relief as the nature of the case might require."

In their statement of defence the trustees pleaded as follows :—

"The defendants submit that under the circumstances aforesaid, this honourable Court has no jurisdiction to make any such order as is claimed in this action, and that in any event this honourable Court has only jurisdiction to make an order for the administration of the English personal estate of the said testator.

"The defendants further submit, that if this honourable Court shall be of opinion that it has such jurisdiction as aforesaid, the exercise of such jurisdiction is a matter of discretion, and that under the circumstances aforesaid, it is expedient that this honourable Court should, in the exercise of its discretion, refuse to make any such order as is claimed in this action, or that, in any event, such order should be limited to the English personal estate of the said testator."

The case came up before Mr. Justice Manisty on the 18th January, 1882, with reference to the question of jurisdiction. Mr. Archibald Orr Ewing was sworn on that occasion, and the following points, which were not disputed,

were elicited by his evidence. The deceased John Orr Ewing had no residence but in Scotland. He had a place of business in Glasgow, but carried on business in Dumbartonshire. At the time of his death, out of the whole estate only £25,235, 12s. 6d. was situated in England; at the date the writ in the action was issued—namely, 25th February, 1880—£2700 only was locally situated in England, the trustees having sold the English shares and put them into the estate in Scotland; between 25th February, 1880, and 18th February, 1882, the date of Mr. Archibald Orr Ewing's examination, the £2700 of moveable property in England, had also been realised and transferred to Scotland. At the date of the testator's death there were no English debts. The important part of the case, of course, was the craving that the estate should be administered under the direction of the English Court of Chancery, the theory set forward being that the plaintiff, Malcolm Hart Orr Ewing, being interested in the residue of the estate of the deceased, who had died with property in England, the English Court of Chancery were entitled and bound to exercise jurisdiction over the whole estate. Mr. Justice Manisty dismissed the action. He said at the outset that there were two questions—one whether the Court of Chancery could entertain the suit, and the other whether the Court ought to exercise that jurisdiction, and make the decree craved for. He said he entertained no doubt that the Court had jurisdiction, but came to the conclusion that it was not desirable in the circumstances that that jurisdiction should be exercised. After stating that the testator died domiciled in Scotland, and that all the assets in England had been transferred to Scotland at the date of judgment, and all except £2700 had been transferred before the raising of the action, he went on to say:—

"On the one side it is said that the authorities are conclusive that the plaintiff, having an interest in the estate, and being resident (whether that will make a difference or not I need not stop to inquire) in England, and suing by his next friend, has the right to have an account taken of the whole of the estate in

Scotland and in England with a view to the administration of the estate, and no doubt the authorities are somewhat difficult to reconcile. It is more the dicta of noble and learned Judges—or noble and learned Lords—than actual decisions which might create a great difficulty (in my own mind, at all events), as to what was the law on the subject. Certain principles or certain heads of law, so to speak, are undoubted in the case of a testator domiciled in a foreign country, which is the same thing as Scotland in the eye of the law, having all his estate in that country, in the country of his domicile, but in point of fact it may be in many other countries as well. According to the law of England, so far as I have been able to discover, and what I have always considered with regard to the law of England, this Court has always considered that if there be, as there must be, a legal representative in England, and assets in England, and a person interested in the general estate comes to this Court to have his interest protected, this Court will direct such inquiry to be made as will enable it to protect the property of that individual. So also with regard to creditors. At the instance of creditors this Court, having legal personal representatives in England, and assets in England, if put in motion by a creditor, will see that the debts are paid before the legal personal representatives part with any of the property, either to the legal personal representatives in the country of the domicile, or to any of the beneficiaries, and I am far from saying that there may not be circumstances, such as existed in Preston *v.* Melville, where they will not only lend their aid to creditors, but they will also lend their aid to beneficiaries. But the principle, I think, is beyond controversy, that except for the purpose of protecting their interest so far as they can do it with regard to the assets which are within the jurisdiction, they do not administer the other assets which are in the country of the domicile."

I conclude my reference to Mr. Justice Manisty's judgment with the following pregnant passage :—

"Is it to be said really because there is £2700 here, which may or may not be applicable to that £60,000, or to the residue, that all this machinery is to be put in motion, and that cost incurred in order to say how much of that ought to be set apart towards the infant's share in the £60,000, or in the residue? I cannot conceive anything more disastrous than to direct an inquiry of such a character; and believing, as I do, or rather I should not say

believing as I do, but there being no evidence whatever to lead me to suspect that there is anything improper with regard to the conduct of the legal personal representatives (call them trustees if you please) in Scotland, I think it is infinitely to the advantage of the infant and of every one concerned that that small sum *should be administered in Scotland*, and that is the whole matter which is left over as to which the Court has any jurisdiction as regards distribution, although it may have had jurisdiction to inquire, and I will assume had jurisdiction to inquire, what the whole estate consisted of, with a view to see how far the infant's interest in that small sum ought to be protected; I say, having regard to all those circumstances, and the fact that all the assets there are now in the hands of the trustees in Scotland, I see no reason whatever for making a decree to take an account of the whole of the estate, merely to arrive at a conclusion which practically would be of no use to the infant, and would be very detrimental, as it seems to me, to the interests of all parties concerned in the estate. It would be, as far as I can see, an idle proceeding, brought at great cost, and leading to no result that could in any view of the case be of benefit to the parties concerned; because this infant is only one of several, and it is only when a vast number of things are done and paid that their rights arise. If this Court has a discretion, I should say that under the circumstances that discretion would be properly exercised in making an order as regards taking an account, which can be done if necessary in Scotland, and infinitely better for the parties, if it was necessary to take any account at all, or to have an administration suit at all. It would then be taken advantageously for all parties, and they could deal with all the questions then as to construction and distribution."

(The words italicised seem to have been omitted from the report from which I make the above extract. I supply them as necessarily inferred by the context.)

The case came again before the Master of the Rolls and Lords-Justices Cotton and Bowen, on appeal from the judgment of Mr. Justice Manisty dismissing the action. The Master of the Rolls seems to have taken up the view that the objections to jurisdiction should have been made at or prior to the time of the inquiry by the Chief Clerk as to whether the action was a proper one in the interest of the infant plaintiffs. The position of the trustees, how-

ever, was that so long as there was no direct challenge to have the whole estate put under Chancery jurisdiction, they had no option but to appear in respect that a portion of it, however small, was admittedly in England, and, further, that there were three trustees then resident there. In his argument, Mr. Rigby said that the three trustees who were resident in Scotland at the date of the service of the writ "did not object to the service—they raised no objection to it. From my point of view it is unimportant they should have done this, but at anyrate they didn't. They allowed the opportunity to go by, if they had any opportunity, to object to the jurisdiction, or that they ought not to be served, and, as your Lordship sees, they actually took proceedings in the action to have it stayed." In the course of the argument, Mr. Rigby, referring to a passage in Mr. Justice Manisty's judgment, said: "In the case of a testator domiciled in a foreign country, which is the same as Scotland in the eye of the law." The Master of the Rolls interjected: "I did not know that that was the proposition. Scotland is not a foreign country." The somewhat amusing way in which Sir George Jessel refers to the opinion of Lord Westbury, which was quoted to him in the case of Enohin *v.* Wylie, is worth giving. He said: "I do not know what he meant. Lord Westbury was very fond of grand general propositions which would not bear any strict examination." The passage in Lord Westbury's judgment which was referred to was this: "I hold it to be now put beyond all possibility of question that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at the date of his death. . . . To the Court of the domicile belongs the interpretation and construction of the will of the testator." In giving judgment, after pointing out that the plaintiff had a substantial interest in the residue, the Master of the Rolls said:—

"But it happens that the testator was a domiciled Scotchman, and it happens that his six executors are also Scotchmen. It happens that the plaintiff was resident in England; that two out

of the six executors were resident in England; that one out of the six executors was resident for a large portion of the year in England, and was served in England; and that the other three executors resided in Scotland; and that all the six executors proved the will both in Scotland and England. It also appears that of the half-million or thereabouts of which the testator died possessed, he was at his decease entitled to about £25,000 in England, and that the rest of his property was in Scotland. That being so, what difference does it make—I suppose it makes no difference—whether the testator was a domiciled Scotchman, or a domiciled Irishman, or a domiciled Frenchman? If people in this country are liable to pay or to give security for a large sum of money, it is quite immaterial how the plaintiff's title arises, and under what instrument, provided he has a title to this money in the hands of the defendants, and the defendants are within the jurisdiction. As regards three of the defendants, they clearly were; and, as to them, I cannot see a shadow of defence. As regards the other three, it has happened that they were served in Scotland, out of the jurisdiction. They appeared, not under protest, but in the ordinary way, and submitted to the jurisdiction. It appears to me that from that moment they were in exactly the same position as the other three, and they can no longer object that they were not properly served; and the suit went on. Then, what did they do after they appeared? They took a proceeding to inquire as to whether the suit, as then constituted, was for the benefit of the infant; that is, they not only allowed the suit to go on, but took an inquiry. In the result it came before me; but I have no recollection of it. I assume it to be so. In the result, the judge decided that it was a proper suit to go on, and after that they let it go to trial; and then, at the trial they object, as I see by the pleadings, that there was no jurisdiction. As I said, in the course of the argument, the jurisdiction of the Court of Chancery, which has been transferred to the High Court, is a personal jurisdiction. It is a jurisdiction exercised against a defendant, resident and and within the jurisdiction; or, properly served outside the jurisdiction; and who submits to the jurisdiction. Therefore, there was plenty of jurisdiction. What becomes of all the argument and all the defence? It really amounts to nothing at all. Now, I am going to say a word or two about the supposed hardship and the supposed inconvenience. When you have a defendant in Scotland served out of the jurisdiction, he has a right to come to the Court and say, 'I ought not to be sued in Eng-

land. There are reasons why I should not be dragged up from Scotland to be sued in England;" and the three defendants that were served—I do not say they would have succeeded under the circumstances of this case, if they had made such a motion—but they could have made a motion at the proper time to have the order for service on them discharged, on the ground that they ought to be sued in Scotland, the country of their residence, and not in England. Well, in considering that motion, it being in the discretion of the Court to order service out of the jurisdiction, the Court does regard convenience and inconvenience; because the Court has regard, in the first instance, to the inconvenience that may be suffered by the defendants from being sued out of their own country, and it has regard also to the various other matters, and it decides whether it is proper that they should be so sued. But that is a totally different application from a resistance to a judgment at the trial or hearing. Well, then, there is another thing to be observed. I caught, during the argument, an expression to which I do not assent. Scotland was called a foreign country; a foreign jurisdiction. All that, in my opinion, is quite erroneous. Ever since the Union of the Kingdom of Great Britain, Scotland has been an integral part of Great Britain. It is not a foreign country. It has a separate legal jurisdiction, and so have divers counties in England. One of them still has. At one time Wales had a separate jurisdiction, the Court of Great Session. In fact, until far on in this century, the County Palatine of Durham had a separate jurisdiction. As I said before, there are still the Duchy and Palatine Courts in Lancashire. To talk of Scotland as a foreign country, and to say that the same rules apply, is, I think, a total error. It is not only an integral part of this kingdom, but the judgment of this Court can be enforced in Scotland in the same way that the judgment of a Scotch Court can be enforced in England. I can quite understand it may be very expensive and very troublesome to have a Scotch estate administered in London, or *vice versa*, an English estate in Scotland. But, on the other hand, there may be no such expense. I am told in the present instance, as a fact, that the accounts are comprised in a few items, and it may not cost one penny more, considering that three of the defendants are resident in England, to have accounts and affidavits sent to London, than having it taken to Scotland. It may not in the present instance mean any additional expense. But the ground on which I put my judgment is this: That where the Court has jurisdiction at

the trial of an action, if a liability is established against a defendant, the Court cannot decline to exercise that jurisdiction, except in the one single case where it is a question of abuse of jurisdiction—that is, where the defendant alleges that he is doubly vexed."

I have given this passage at length, because Lords-Justices Cotton and Bowen substantially agreed with this judgment, and finally the House of Lords took very much the same view as is here set forth. The result, therefore, of this judgment was to hold, in the first place, that the trustees were subject to the jurisdiction of the Court of Chancery; and, in the second place, that they were bound to have the estate administered under the Court of Chancery. The date of the judgment of the Court of Appeal was 29th November, 1882.

An appeal was made to the House of Lords against the order on the trustees to account to the Court of Chancery for their administration of the estate, but pending the disposal of this appeal an action was raised in the Court of Session at the instance of John Orr Ewing of the Rookery, Northampton; Archibald Orr Ewing, the younger; and Hugh Moody Robertson Ewing, turkey-red dyers in Glasgow; and James Robert Ewing, residing in Dumbartonshire, against the trustees. The whole four pursuers are children of James Ewing, and the only surviving brothers of the infant plaintiff in the English action. The 6th article of the condescendence is as follows:—

"The pursuers, as specially the residuary legatees of the testator, are largely interested in the said estate, and in the administration thereof, and in the preventing of unusual or unnecessary expense in the carrying out of said administration; and it is the duty of the defenders to carry out the administration in Scotland, and according to the law of Scotland and the procedure and authority of the Courts of Scotland; and said defenders are not entitled to devolve the duties of said administration on any third party, whether subject or not to the jurisdiction of the Courts of Scotland; and particularly, they are not entitled to devolve their said duties upon any Court or tribunal outwith Scotland, and beyond the jurisdiction and authority of the Courts of Scotland."

This case was debated before Lord Fraser on 23rd October, but before judgment was pronounced the appeal case came up before the House of Lords, and judgment in it was given on 30th November last. It was obvious from the first that the Court was not inclined to disturb the judgment of the Master of the Rolls and the other judges in the Court of Appeal. In his judgment the Lord Chancellor brushed aside the argument founded upon the confirmation of the trustees by the Commissariot of Dumbartonshire. He said, with reference to this point :—

"This appeal is brought from that decree: and the appellants have contended that, by virtue of the confirmation of the testator's will in Scotland, as that of a domiciled Scotchman (under the statute 21st & 22nd Vict. cap. 56), they became officers of a Scottish Court, accountable and amenable only to the Courts in Scotland, so far, at all events, as relates to that part of the estate which was locally situate in Scotland, and that the High Court of Justice in England had no jurisdiction to make a decree for the execution of the trusts of the will as to any part of the Scottish personal or real estate. They contended, further, that if the English Court had such jurisdiction it was discretionary, and ought not to have been exercised. The argument from the official character of the appellants, by reason of the confirmation of the will by a Scottish Court, may be summarily dismissed. The effect, in that respect, of confirmation in Scotland (or of probate in England) is, and must be, the same, whatever may be the domicile of the testator. It is merely to complete the title of the executors to represent their testator within the local jurisdiction *in mobilibus;* and the necessity for this is independent of domicile. Those special provisions of the statute in which a Scotch domicile is mentioned, affect the inventory only, and not the character of the title obtained by confirmation. The Scottish confirmation requires to be, and in the present case it was, sealed by the English Court of Probate; which sealing, under the statute, has the same operation as if probate had been granted by the English Court. The appellants, therefore, now represent their testator *in mobilibus,* within both jurisdictions; and under the will they are trustees, not of part only of the estate, but of the whole. The Court which grants confirmation or probate is not a Court of administration, though (when there are no executors nominated by the will) it may appoint administrators; nor

are the executors (in any sense exclusive of the jurisdiction of any other forum, in a case in which it might otherwise attach) officers of that Court."

Further on he said :—

"These arguments failing, the jurisdiction of the English Court is established upon elementary principles. The Courts of equity in England are, and always have been, Courts of conscience, operating *in personam*, and not *in rem;* and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts, as to subjects which were not, either locally or *ratione domicilii*, within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the Colonies, in foreign countries (Penn *v.* Baltimore, 1 Vesey, Senior, 444 ; and see the notes to that case in 2 'Leading Cases Equity,' 4th edition, pages 939, 940, 941). A jurisdiction against trustees, which is not excluded *ratione legis rei sitæ* as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicile ; and for this purpose it makes no difference, whether the trust is constituted *inter vivos* or by a will or *mortis causa* deed. Accordingly, it has always been the practice of the English Court of Chancery (as was said by Lord-Justice James in Stirling-Maxwell *v.* Cartwright, 11 Chancery Division, 523) to administer, as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad, by decrees like that now in question. The appellants' counsel were not able to produce any precedent for an administration decree, limited (where there was a general probate and a general trust) to assets locally situate within the jurisdiction. They admitted the authority of Stirling-Maxwell *v.* Cartwright to be against them. Two of the Judges who decided that case, as well as two of those who decided the present case, in the Court of Appeal, had great knowledge and experience of Chancery practice. The English jurisdiction was sustained on the same principle, in Beattie *v.* Johnstone (10 Clark and Finnelly, 84). If English trustees, having in their hands English trust-funds, were found within the jurisdiction of the Scottish Courts, those Courts, upon the same principle, might compel them to do their duty ('Ferguson's Trustee ; 3 Paton's Appeal Cases')."

He also said :—

"It was argued, however, that although the Court may have

had jurisdiction it was discretionary, and ought not to have been exercised. I cannot agree that, under the circumstances of this case, the Court had such a discretion. When a suit is brought *in foro competente*, by a proper plaintiff, against defendants properly amenable to the jurisdiction, praying for relief to which, by the ordinary course of the *lex fori*, the plaintiff is entitled to, it would be error to deny him such relief, unless for some reason sufficient in law. Upon the merits, the present plaintiff's case did not fail, and indeed this was not controverted. Being an infant, it was proper for the Court to consider whether the prosecution of the suit was or was not for his benefit. It made that inquiry, at the instance of the appellants themselves, with the result that the action was found to be for his benefit; and the order directing its continued prosecution was not appealed from. After this the decree was, in my opinion, of course. If, indeed, there had been any proceedings pending in a Scottish Court, equally beneficial to the infant plaintiff, and in which his rights and interests could have been adequately protected, it would have been competent, and perhaps right, for the High Court in England to stay the further prosecution of this suit, either before or after decree. But no such proceedings were pending in any Scottish Court; whether they could or could not have been taken, it is unnecessary to inquire. If (as was stated at the bar) they could not, that certainly was no reason why the English Court, proceeding against its own rules and principles and against persons subject to its jurisdiction, should not exercise its jurisdiction in the usual manner."

In the course of his judgment, Lord Blackburn said :—

"It was argued that the domicile of the testator being Scotch, the Court of Chancery had no jurisdiction at all; that the jurisdiction depended on the domicile of the testator, or at least on the probate in England, and was therefore confined to the comparatively small part of the property that was obtained by means of the English probate. I do not think that there is either principle or authority for this contention. The jurisdiction of the Court of Chancery is *in personam*. It acts upon the person whom it finds within its jurisdiction, and compels him to perform the duty which he owes to the plaintiff."

He also said :—

"I think, therefore, it is plain that the Court had jurisdiction; and that was the opinion of Mr. Justice Manisty as well as of the Court of Appeal. But Mr. Justice Manisty thought that the

Court had a discretion either to exercise this jurisdiction or not, and that, under the circumstances, it should not exercise it. I do not agree in thinking that the order should, or indeed could, if made, be confined to that part of the property which is in England, or which was obtained by virtue of an English probate; as was pointed out by Vice-Chancellor Kindersley, in Innes *v.* Mitchell, 4 Drewry, 98, the trust is an entire trust as to all the property. But it is said that there is a discretion as to making an order to carry out the trusts under the direction of the Court. If this were a new question, I should think there was much to be said in favour of this view. For the order made here, that the trusts should be carried out under the direction of the Court, is one which I do think is not always for the advantage of all concerned. There are great advantages, no doubt, to the trustees, who, whenever they have a doubt as to what is to be done, can avoid responsibility by asking for the direction of the Court. And there are advantages to those beneficially interested, as the trustees are under the control of the Court, and are not able to do what they may consider proper acts, if the Court thinks those acts of such a nature as ought not to be done. But, on the other hand, such an order does and must hamper the trustees, cause delay and expense—not necessarily great delay and expense, but always some; and where the trustees have not done, and it is not suggested that they are going to do, anything wrong, I doubt whether it is always for the benefit of all concerned to make such an order. And I am confirmed in this doubt, because, as far as I can learn, you cannot in Scotland throw a trust into the Court of Session in the same way as you can throw it into Chancery in England. At least, if it can be done, it is not done. But though I should have had this doubt if it were new, I think it has been too long the course of Chancery to treat this as a right which the plaintiff has *ex debito justitiæ*. I find no case in which it has been said that he must satisfy the Court that it is discreet to make the order. I think, if it lay on the plaintiff to satisfy the Court, in its discretion, that it was better for all concerned that the trust should be administered under the control of the Court of Chancery, the fact that the whole matter is substantially Scotch would throw upon the plaintiff an additional burthen of proof. But I find, as I said, no case in which this has been laid down."

Lord Watson contented himself with saying:—

"This is an English case, which it is my duty to decide

according to the principles of English law; and its circumstances are such that the Court of Chancery could not, in my opinion, have declined jurisdiction, without disregarding a long and consistent series of precedents, which must now be held to be binding on all who administer justice in that Court."

It was said, in a pleading to be afterwards referred to, that Lord Fraser delayed pronouncing judgment in the Scotch case until the judgment of the House of Lords had been given. The public, at least will be glad that the action was brought before Lord Fraser, because his reputation as a scientific jurist is certainly as high as that of any Judge on the bench of either Scotland or England. His judgment was delivered on 15th December last, and from it I extract the following quotation :—

"The whole funds are in Scotland, four of the executors are domiciled Scotchmen, and the trust-disposition is a deed in the form of Scotch conveyancing. It was, therefore, not surprising that the executors determined to resist these proceedings in Chancery, and accordingly pleaded that they were incompetent, or at all events inexpedient, and therefore ought not to be allowed. But the Appeal Court in England, and the House of Lords, who affirmed their deliverance, have held that by the practice of the English Court of Chancery the executors must comply with the order, not merely as regards the £25,000 that were in England at the testator's death, but also with the whole of the Scottish funds that never were in England at all, which are included in the Scottish confirmation, and which were only ingathered in consequence of that Scottish Confirmation. It is said that this is the settled practice of that Court, and must be upheld, however inconvenient and however expensive it may be. Lord Blackburn suggests as the only remedy two courses—one the alteration of the Chancery practice, the other the intervention of the Legislature. The pursuers have thought that there is another mode of remedying the grievance of which they complain, and that is by the present action. It has various conclusions, but the important one is the conclusion for interdict against the executors removing the estate or the title-deed and writs from beyond the jurisdiction and control of the Scottish Courts, and from rendering any account of the estate to, or otherwise placing the administration of it under the authority of, the High Court of Justice in England. If decree

be pronounced in terms of this conclusion, there is an immediate collision between the Courts of the two countries, and it is therefore necessary precisely to see how this matter is dealt with, as a point of international law, in other countries than England, by the Courts of civilised nations. It is perfectly clear that, if the practice of the Court of Chancery in England is inconsistent with international law, no Court of a foreign country is bound to respect it. When this case was before the Appeal Court, the late Master of the Rolls stated that it was an error to consider Scotland in this question as a foreign country. He described it as not a foreign jurisdiction. He was a very learned judge in regard to the law of England, but he obviously knew little of the law of Scotland or of Scottish history, and his opinion, so far as he touches upon this matter, does not represent him fairly. He adverted to the fact that the judgments of the English Courts could be enforced in Scotland, and *vice versa;* and that in regard to any other foreign country there was a difficulty in ascertaining what its law was, which did not exist in reference to Scotland and England, seeing that a case might be sent by the Supreme Court of the one country for the opinion of the Supreme Court of the other. This is, no doubt, all quite true, but all these convenient arrangements—the suggestion of which came from Scottish lawyers—did not arise from the union between the two kingdoms. Until recent days the judgments of English Courts could no more be enforced in Scotland than those of the Courts of France. This was effected simply, by an Act of Parliament for the convenience of the people of both countries. And so also it was by Act of Parliament that the practical way of ascertaining the law of one country by sending a case for the opinion of the Supreme Court of the other country was recated. Scotland, in regard to its laws, is a foreign country, and except where jurisdiction is created in the manner recognised according to international law, or by Act of Parliament passed since the Union, no person in Scotland can be cited to the English Courts. Though the two countries be now governed by the same sovereign, and be subject to the same Parliament, yet this was under the condition, as set forth in the 18th Article of the Treaty of Union, that while 'the laws which concern publick right, policy, and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern privat right, except for evident utility of the subjects within Scotland.' And this is followed up by the provision in the 19th Article, which positively declares 'that no causes in Scotland

be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall.' Whether all this made Scotland a foreign country *quoad* its laws, or as a country having Courts exercising a foreign jurisdiction, is a question not material to solve. The two expressions do, in this connection mean the same thing. Scotland has a law different from that of England; and, *quoad* that law, it is an independent State, entitled to demand from England adherence to the rules of international law, which determine the rights of natives of foreign States which may be made the subject of action in her Courts. Now, then, in what manner does the law deal with the case of a party who dies possessed of moveable estate situated in different countries? Until this assertion of right on the part of the Court of Chancery to compel administration of an estate, merely because a portion of it was found at the death within England, the answer would have been simple enough. It is a rule of the law of nations that an executor is not entitled to collect the estate of the deceased until his right to do so has been confirmed by the competent Court of every country where there is property to ingather. However clear may be the nomination of the executor by the deceased's will, yet confirmation or probate must be obtained. If an Englishman have funds in Scotland, at his death his executor must confirm in Scotland (Ersk., 3-2-42: Smith, 24 D. 1142; Hastings *v.* Hastings, 14 D. 489), and so likewise must the executor of a Scotchman obtain probate in England; and the same rule is enforced in the United States with reference to properties belonging to a citizen of one State which are situated in another, or of foreigners who have assets in the United States (Story, sect. 513). But there are two kinds of administration. There is the administration by the executor of the domicile of the deceased, and the administration by the executor appointed in the country where there was no domicile, but where there were assets. The ground for the appointment of a person in reference to the latter case has been attributed to different principles. Wharton, in his treatise on the 'Conflict of Laws,' (sect. 605), says that property is primarily subject to the law of the territory wherein it is found. The sovereign power there is guardian of all such property within its bounds, and it is its duty to see that its use is secured to the proper owner. Hence those who meddle with it when occupancy has been closed by death must first obtain the sanction of the Court of the place under whose control it is. Story (sect. 512), on the other hand, traces the practice to the hardship that would result

to creditors in the country of the *situs*, if it were allowed to the executor or administrator of the domicile to withdraw funds from the foreign country without the payment of debts there, 'and thus to leave the creditors to seek their remedy in the domicile of the original executor or administrator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law.' The reason for the practice is in no way material, seeing that the practice is settled and approved in all countries. The material point is to ascertain what is the effect of the grant of administration in another country than that of the domicile. The executor confirmed in the domicile is the principal administrator of the estate. The executor appointed in a foreign country who has taken out probate or letters of administration there, has a right to ingather the estate within the territory of the Court that gives him probate. He is entitled and obliged, from the proceeds of his recoveries to pay all the debts of creditors in that foreign country. Questions of nicety have arisen as to whether he is entitled to pay the creditors there in full, if the estate, taken as a whole—that of the domicile and that of the *situs*—be insolvent, while the assets in the country of the ancillary administration may be sufficient to pay in full the creditors there. It is unnecessary further to refer to this point, because no such question arises in the present case. The ancillary executor is bound to account to the Court which gives him probate for all the money that he has recovered within its jurisdiction, and the executor of the domicile is not entitled to demand from him these moneys before such accounting. This was the decision of the House of Lords in Preston *v.* Melville, 2 Rob. Ap. 88. But, after having accounted to the Court where the funds were found, he is bound to remit any balance that may be in his hands to the executor of the domicile, the general administrator of the estate. Now all this is perfectly established practice among nations. So far as can be discovered, no such pretension as that which has been set up by the Court of Chancery in England has ever been asserted by the Courts of any other country. None of the States of America have asserted the right to bring into the Courts of the ancillary administration, and to administer there, the estate of a citizen domiciled in another State of the Union, merely because he had dollars invested in the State of the ancillary administrator. Nor is there any instance of any of the French Courts compelling an Englishman who had moneys in the French Rentes to account

for the whole of his estate in the French Courts. On the contrary, as regards France, the Courts of that country do not hold themselves competent to entertain any suit for the division of a succession of a foreigner who may have died in France, and who may have personal estate there, if his domicile were in a foreign country. All that the French Courts consider themselves entitled to do is to maintain the *status quo*, by sequestrating the estates in France, until the administration of the succession be settled in the country of the domicile. (See 'Bar's International Law' (Gillespie), 536; 'Note by Foderé to Droit International Privé of Fiore,' p. 709; 'Fœlix,' sec. 159; Margo *v.* MacHenry, 1st March, 1881, as in 'Journal du Droit International Privé,' vol. 8, p. 432; Falvez *v.* De Souza, 31st March, 1876. *Ibid.* vol. 4, p. 429."

He then proceeds to show that this is the recognised law of Scotland and America, and illustrates this statement by authority and precedent. He refers to the argument that the House of Lords—the Supreme Court of Appeal in Great Britain—having upheld the jurisdiction of the Court of Chancery to administer the Scotch estate, inferior Courts must give effect to that judgment, in terms which I may briefly sum up. The House of Lords, he in effect says, as Appellate Court from the Court of Chancery, may have thought itself compelled by precedent to arrive at such a conclusion as regards an appeal from the Court of Chancery; but if the House of Lords has Lord Fraser's decision brought before them, they must deal with it on the principles of Scotch and International law, and, should the result be a conflict between Scotch and Chancery law, it is for the Legislature to untie the complicated knot; the House of Lords cannot, however, sitting as an appellate tribunal from Scotland, disregard what is Scotch law and International law on account of a Chancery decision. His opinion concludes thus:—

"The result of my consideration of this case is, that the orders of the Court of Chancery in England are inconsistent with the rules and practices between independent nations; and that therefore the Courts of the domicile are bound, in the protection of the interests of the estate within the domicile (and to this estate alone is my judgment confined), to grant interdict against compliance with these orders."

The craving in the action brought before Lord Fraser was that—

"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that by virtue of said trust-disposition and settlement and relative codicils, and of said testament-testamentar, the defenders are bound, as trustees and executors foresaid, to uplift, receive, administer, and dispose of the whole estate and effects of the said deceased John Orr Ewing, and to give effect to and carry out the purposes of his said trust-disposition and settlement and relative codicils in Scotland, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish Courts alone: And further, it ought and should be found and declared, by decree foresaid, that the defenders, as trustees and executors foresaid, are not entitled to place the said estate and effects under the control of the Chancery Division of the High Court of Justice in England, or to administer the same under the directions of the said High Court of Justice in England, or any of the divisions thereof, or of any other foreign Court or tribunal furth of Scotland, and having no jurisdiction in Scotland, or to place the said estate and effects beyond the control of the Scottish Courts: And further, it ought and should be found and declared, by decree foresaid, that the defenders, as trustees and executors foresaid, are bound to render just count and reckoning for their intromissions with said estate and effects, whenever the same shall be legally required, in Scotland, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish Courts alone; and that the said defenders are not bound nor entitled to render any accounts of the said estate and effects to the said High Court of Justice in England, or any of the divisions thereof, or to any other foreign tribunal furth of Scotland, and having no jurisdiction in Scotland; nor bound nor entitled to part with the custody of any of the title-deeds, writs, or evidents of the said estate, or to deposit the same in the custody of any Court situated furth of Scotland, and having no jurisdiction in Scotland, or to place the same beyond the jurisdiction or control of the Courts of Scotland: And the defenders, ought and should be interdicted, prohibited, and discharged, by decree foresaid, from withdrawing and removing the said estate and effects, and any of the title-deeds, writs, or evidents thereof, furth of Scotland, and beyond the jurisdiction

and control of the Scottish Courts, and from giving up the same, or any part thereof, to any person or persons to be so removed, or otherwise to be put beyond the custody and control of the said defenders and the said Courts of Scotland, or beyond the reach of any process or legal diligence competent to the pursuers and other beneficiaries interested in said estate and effects, and from rendering any account or accounts of the said estate to, or otherwise placing the administration thereof under the authority and control of the said High Court of Justice in England, or of any tribunal or Court whatsoever other than the Courts of Scotland; or otherwise, and alternatively to the foresaid conclusion for interdict, and whether decree shall or shall not be pronounced, in terms of the declaratory conclusions before written, our said Lords ought and should remove the defenders, the said William Ewing, Archibald Orr Ewing, James Ewing, William Ewing Gilmour, Henry Brock, and Alexander Bennett M'Grigor, from their said office of trust and executry; or otherwise, and whether the defenders shall or shall not be removed from their said office, our said Lords ought and should sequestrate the whole estate and effects of the said deceased John Orr Ewing, contained and enumerated in the inventory of his estate recorded in the Court books of the Commissariot of Dumbarton, the 13th day of May, 1878, and appoint such person or persons as our said Lords shall think fit to be judicial factor thereon, with all the powers usual, competent, and necessary for carrying out the said trust, and for carrying into effect the will of the testator, and the purposes of his said trust-disposition and settlement."

And decree was substantially granted in terms of the craving.

Subsequent to the date of Lord Fraser's judgment on Friday, 21st December last, a motion was made before Mr. Justice Chitty, in which Mr. Romer brought the matter before the Chancery Court. Mr. Romer put it in this way :—

"Those beneficiaries have lately commenced an action in Scotland against the defendants to this action to have it declared, putting it shortly, that they ought not to comply with the order of this Court. I wish to speak with the greatest possible respect for the learned Judge. The action was commenced by those beneficiaries who had got leave to attend here, and are attending. They have commenced an action to prevent the defenders from

complying with the orders of this Court as to rendering accounts and obeying the order of the Court here, and the Lord Ordinary (Lord Fraser) has made an order."

Finally, an order was made upon the trustees to comply with the order of the House of Lords. Mr. Justice Chitty directed them to appeal against the judgment of Lord Fraser. The following then passed :—

"Mr. WHITHORNE.—I quite understand. May I say a word more; will your Lordship direct a stay of proceedings until we have appealed?

"Mr. Justice CHITTY.—No; I will not cast the slightest doubt on the jurisdiction of this Court.

"Mr. WHITHORNE.—With submission, would that be casting any doubt?

"Mr. Justice CHITTY.—No; I will not say, but you will be protected; it is mere matter of form."

On 16th January, the London solicitors of the trustees attended an appointment before the Junior Clerk of Chancery, which had been made for the purpose of vouching certain of the executors' accounts. They attended, however, simply to state that owing to the interdict of Lord Fraser the trustees were unable to proceed with the vouching of the accounts, or in fact to do anything, as by so doing they would be incurring penalties, and that they attended the appointment only out of respect to the Court.

The case was put out for hearing before the First Division of the Court of Session, on Thursday, 24th January. The argument lasted three days, 24th, 25th, and 29th January. At the outset, on the motion of the pursuers, the following plea was added to the record :—

"The action or cause in the Chancery Division of the High Court of Justice in England, in so far as the same relates to the estate of John Orr Ewing situated in Scotland at the time of his death, being in violation of the Sixth Article of the Treaty of Union all the proceedings therein, so far as relates to the said estate, are null and void, and the defenders ought to be interdicted

from complying with any orders pronounced by said Court in such action, so far as regards said estate."

The counsel for the trustees were Messrs. Pearson and W. C. Smith; and for the pursuers, Messrs. J. P. B. Robertson and G. W. Burnet. It was expected that the Lord Advocate would lead for the trustees, but, from some unexplained reason, he did not appear in the case, and I understand Mr. Pearson was only engaged late the night before the case came up for hearing. An exhaustive argument on both sides of the bar was addressed to the Court. It is to be noted that Mr. Robertson pressed for the sequestration of the estate and the appointment of a judicial factor. It may be well to print the close of Mr. Robertson's eloquent speech in connection with this point:—

"The remedies stated in the printed conclusions were alternative remedies—interdict, or sequestration, with or without the removal of the trustees. The question of which remedy ought to be asked and granted was dependent upon the reply to this inquiry—'If I have a right to preservation of the estate, how will the estate be practically preserved and kept intact?' Without imputing anything to the trustees, he submitted that it was proved by the admitted facts of the case, as regards the English administration—admitted in their defences, and by their arguments—that they would not give to their Lordships any indication or reasonable expectation that they could or would fulfil the trust of the estate as left in their hands. They said they would obey the order of the English Court in the meantime, but they gave no assurance that they would cease at some time to disobey it.

"Mr. SMITH here made reference to the decree of the English Court, threatening the trustees with committal should they disobey the English order.

"Mr. ROBERTSON said that threat sharpened and pointed his statement that these trustees were not at present, as they ought to be, under the disposition of the deceased, the real custodiers of the trust-estate. He feared the remedy of interdict would not prevent the final removal of the funds from Scotland to England. Such of the trustees as remained in Scotland might be able to obstruct the payment over to the Court of Chancery of the funds. But there were three trustees in England and three in Scotland, and if one of the gentlemen resi-

dent in Scotland happened to cross the Border to go to London, he might there be affected by diligence of the Court of Chancery, and there put into a position for disobeying that Court, into which a trustee ought not to be placed. Therefore, conform to their Lordships' practice, he thought they should preserve the estate by placing it beyond the possibility of dilapidation by granting sequestration.

"Lord SHAND.—Sequestration, and the appointment of a judicial factor?

"Mr. ROBERTSON.—Yes, coupled with the removal of the trustees, whose presence, perhaps, might embarrass the operations of the judicial factor. Experience since the issuing of interdict by the Lord Ordinary showed that the alternative of sequestration was the more desirable remedy. In the event of their Lordships granting sequestration, he suggested the issuing of *interim* interdict until the estate was safe in the hands of the judicial factor."

I may add the suggestive fact stated by the counsel for the trustees :—

"About the order, I desire to make this statement to your Lordships. The defenders have been advised by English counsel that the Chancery Division will not permit them, as English executors, to resign until the proceedings in the administration are concluded."

Their Lordships reserved judgment, and the case was put out for advising on Friday, 29th February.

The Lord President said :—

"This action of declarator is raised by four of the five persons who are equally interested in the residue of the estate of the deceased John Orr Ewing, merchant in Glasgow, against the trustees and executors appointed by his trust-disposition and settlement, dated 17th November, 1876. According to the provisions of the deed, the great bulk of the estate falls into residue. The only other person interested in the residue is Malcolm Hart Orr Ewing, who is in minority, and in whose name certain proceedings have been taken in the Chancery Division of the High Court of Justice in England, which are alleged to be productive of much embarrassment and expense in the administration of the trust committed to the defenders by the testator.

"The action is brought under very exceptional circumstances, and the conclusions of the summons raise questions of great public interest.

"Mr John Orr Ewing, the testator, died on the 15th of April 1878, domiciled in Scotland. His settlement was prepared and executed according to the forms of Scottish conveyancing. He was the owner of a landed estate in Dumbartonshire; and the great bulk of his personal or moveable estate was, at his death, locally situated in Scotland, the proportions being £435,314 (or fifteen-sixteenths) in Scotland, and £25,235 (one-sixteenth) in England. All the trustees are Scotchmen, and only two of them are resident in England, the others being resident in Scotland. The testator had no English creditors, and none of the purposes of the trust required to be performed in England, or elsewhere than in Scotland.

"The trustees proceeded to make up their title to the personal estate, by presenting an inventory in the Commissary Court of the County of Dumbarton, including the English as well as the Scottish moveables, and having obtained confirmation from the Commissary, in terms of section 9 of 21 & 22 Vict. c. 56, and had the confirmation stamped with the seal of the Probate Court in England under section 12 of the same Act, they reduced the personal estate into possession. They were thus duly vested by a decree of the Judge of the Commissary Court of Dumbartonshire, pronounced under express statutory authority, with the whole personal estate of the deceased, and having brought the English assets to Scotland, they proceeded to administer the trust according to the usual practice in this country.

"Such administration by the law of Scotland required no further legal proceedings, after the title of the trustees had been completed by confirmation as executors. The trustees would not have been entitled to throw the estate into Court except upon an allegation, supported by evidence, that there were competitions of right under the trust-settlement between legatees and creditors, or between different persons claiming as beneficiaries under the trust, which the trustees could not undertake to determine without the authority of the Court, or on the ground that there was so much difficulty and embarrassment in the distribution of the estate that the trustees would not be in safety to act on their own judgment. On the same grounds, any person interested in the succession of the deceased who found that he could not obtain what he claimed might have raised an action of multiplepoinding in name of the trustees, for the purpose of having the existing disputes judicially determined. But if either the trustees or the individual took such a proceding

without establishing its necessity, the suit would be dismissed with costs. If the claim of a legatee or creditor is resisted by the trustees, on the ground that the trust-settlement gives no right to the so-called legatee, or that the truster was not, and the trust-estate is not, indebted to the so-called creditor, the legatee or creditor cannot, by any proceeding, throw the estate into the hands of the Court, but must sue the trustees by petitory action for payment. Even where there are competitions of right between different persons to a certain fund or to certain portions of the trust-estate, it is by no means necessary to throw the whole estate into Court. It is only the particular fund, or a part of the estate sufficient to meet the claim of the party who shall be successful in the competition, that requires to be placed *in manibus curiæ*. In such a case also, there is the familiar and very inexpensive remedy of presenting a special case to the Court, where the parties are agreed about the facts.

"The great principle in the administration of Scottish testamentary trusts is, to leave the administration where the testator himself has placed it, unless, from fault or accident, the trust has become unworkable; and even in that case, the Court do not undertake the administration, but appoint new trustees, or a judicial factor, who will occupy the same position, and possess the same powers of extra-judicial administration which the trustees named by the testator occupied and possessed.

"After this explanation it may seem almost superfluous to say that an 'administration suit' of the kind used and sanctioned in the English Courts of Chancery is altogether unknown to Scottish practice. I trust I do not exceed the true limits of a judicial utterance when I add that it is very fortunate for the people of Scotland that it is so.

"The defenders, as trustees and executors, were in the course of administering the estate according to the directions of the testator, when an 'administration suit' was instituted in the Chancery Division of the High Court of Justice in England, and was afterwards carried on in the name of Mr. Malcolm Hart Orr Ewing, already mentioned, and orders have been pronounced against the defenders in that suit, the effect of which would be to supersede the trustees in the performance of the duties intrusted to them by the testator, and to put the management and distribution of the estate entirely in the hands of the Chancery Division.

"This suit was originally brought in name of two of the present

pursuers, as well as in that of Mr. M. Hart Ewing, as 'infants, by George Wellesly Hope, their next friend.' This appears from the proceedings to have been objected to by these two pursuers as done without any authority, and the suit was certified by the chief clerk to have been improperly instituted. With reference to this, the judgment of the late Master of the Rolls bears:—'I think Mr. Hope ought not to have been made a plaintiff at all. He had no direct interest in the estate which is sought to be administered. He is, in fact, a legatee under a residuary legatee's will, and, of course, should not have been a co-plaintiff, and therefore must be struck out. Why it was not done before, I do not know. He could not maintain the suit.' Mr. Hope's name was accordingly struck out, as were those of the two pursuers, which had been used by Mr. Hope without any authority; and with reference to the further question, whether the action should be allowed to proceed, with Mr. Hope as next friend to the other plaintiff, the infant Mr. Hart Ewing, the judgment bears—'I quite agree with all that was said on the part of respondents, that it is not the rule, in the ordinary case, to institute a suit in the name of the infants without communicating wich the infants' father or the actual guardian. Therefore I think that Mr. Hope was not justified in the step he took originally of making these infants plaintiffs, which was a step obviously not for the sake of the infants, but in his own interest for the sake of securing his own legacy.' Notwithstanding this, however, the suit was allowed to proceed on a certificate or affidavit made on behalf of the infants' mother, who was separated from the father, to the effect that she wished the suit to proceed.

"The pursuers aver that the effect of the orders pronounced by the Chancery Division will be to cause the making up of accounts, which are altogether unnecessary, to transfer the personal estate in the defenders' hands from Scotland to England, together with the writs, evidents, and securities thereof, and so place them beyond the control of the defenders as trustees, and beyond the jurisdiction of the Courts of Scotland, and thereby defeat the diligence and process otherwise competent to the pursuers, and tend to lessen, if not to destroy, the value of their interests in the estate. They further aver that these proceedings will cause great and unnecessary expense to the estate, and diminish the amount of the residue to which the pursuers are entitled. Lastly, they aver that the defenders, in obedience to the orders of the English Court, hold themselves not to be entitled to make any payment

out of the estate without the special authority of the English Court, or some official thereof.

"On these allegations, which are in all essential points admitted by the defenders, the pursuers conclude for declarator, that the trust-estate of the deceased John Orr Ewing must, in accordance with his express desire, be administered in Scotland according to Scottish law, and subject to the jurisdiction and control, when necessary, of the Scottish Courts, and that the defenders are not entitled to remove the estate or any part of it, or of the titles, writs, and securities thereof, beyond the jurisdiction of this Court, or to account for the same in any other Court. And on the footing of such declarator, the pursuers further conclude alternatively for interdict against the defenders doing any of these things, or that the Court should sequestrate the estate and appoint a judicial factor to administer the same, either removing the trustees from office or superseding their action in the meantime, until they shall be relieved from the difficulties in which they are at present placed by the orders of the English Court.

"It is evident that, if we pronounce judgment in terms of all or any of these conclusions against the defenders, there will arise immediately a conflict of jurisdiction between this Court and the Chancery Division of the High Court of Justice in England. This is a very serious matter, and we must therefore deliberately consider—(1) what are the relations of the two Courts; and (2) what are the grounds on which the jurisdiction of each Court to deal with this trust-estate is maintained.

"I. As to the relations of the two Courts, I hold that, in proper questions of jurisdiction such as the present, *the judicatories of Scotland and England are as independent of each other, within their respective territories, as if they were the judicatories of two foreign States.* I am anxious to formulate this rule, which is the necessary result of the Treaty of Union, with as much accuracy and precision as possible, because a loose and illogical statement of so important a constitutional doctrine is both dangerous and misleading. I have been, however, so much accustomed to regard it as an incontrovertible proposition that I was somewhat surprised to read in the Chancery proceedings which have been laid before us, this passage in the judgment of so very learned and able a judge as the late Master of the Rolls:—'I caught during the argument an expression to which I do not assent. Scotland was called a foreign country—a foreign jurisdiction. All that, in my opinion, is quite erroneous. Ever since the Union

of the Kingdom of Great Britain, Scotland has been an integral part of Great Britain; it is not a foreign country.' I sympathise with the learned Judge so far, that Scotland and England cannot, with strict propriety, be spoken of as being in the relation of foreign countries. But as the proposition with which he was dealing was, as he says, only 'caught during the argument,' he was probably misled by inaccuracy of expression; and the proposition itself, if expressed more precisely, might have commanded his serious attention. I do not say it would probably have altered his judgment on the case before him. But it might have enabled him to avoid what follows in the statement of his opinion. 'To talk of Scotland as a foreign country, and to say that the same rules apply, is, I think, a total error. It is not only an integral part of this kingdom, but *the judgment of this Court can be enforced in Scotland* in the same way that the judgment of a Scottish Court can be enforced in England. But there is more than that. In the case of a foreign country there is the difficulty of ascertaining the foreign law, and where questions of foreign law arise, it is certainly very inconvenient to try them by the sworn and unsworn testimony of advocates and experts as to what the law is. It is much more convenient, of course, to obtain the decision of the Judges of the country on the law of their own country. Well, now, what has the Legislature done? Recognising that the Legislature has empowered the English Courts, where a question of Scottish law arises in the course of English litigation, to take the opinion of the Scottish Courts, which they are bound to give, and correlatively has empowered the Scottish Courts to take the opinion of the English Courts on a point of English law arising on Scottish litigation, there is, therefore, no difficulty at all in deciding a point of Scottish law in England, because they decide it not in England, but in Scotland, and so with regard to English law in Scotland, because that would be decided in England; all those difficulties are, therefore, purely imaginary.'

"Before I advert further to the reasons which seem to have led the learned Judge to the conclusion that, in questions of jurisdiction, Scotland and England do not stand in the relation of foreign kingdoms, or adopting the more correct formula that the judicatories of Scotland and England are *not* as independent of each other as if they were the judicatories of two foreign States, I wish to cite one very weighty authority which is in terms contradictory of this proposition. In the appeal to the House of Lords from

this Court regarding the guardianship of the present Marquis of Bute, Lord Campbell, as Chancellor, thus expressed himself:— 'I beg to begin by observing that, as to *judicial jurisdiction*, Scotland and England, although politically under the same Crown, and under the supreme sway of one united Legislature, are to be considered as independent foreign countries, unconnected with each other. This case is of a judicial nature, although not between parties who are plaintiffs and defendants, and it is to be treated as if it had occurred in the reign of Queen Elizabeth. . . . The holder of the Great Seal of the United Kingdom is Lord Chancellor of Great Britain, and by statute he has important functions to exercise in Scotland, such as the appointment and dismissal of magistrates, and sealing writs for the election of Scottish Peers and members for Scotland of the House of Commons. But as a Judge his jurisdiction is clearly limited to the realm of England. . . . As Judge he has no jurisdiction in Scotland whatever. In this respect there is an entire equality and reciprocity between the two divisions of this island, and a decree of the Court of Chancery is not entitled to more respect in Scotland than an interlocutor of the Court of Session in England.' The Lord Chancellor was followed in that case by Lords Cranworth, Wensleydale, Chelmsford, and Kingsdown, no one of whom expressed the slightest dissent from his opinion, or even indicated that it was in any respect too unqualified.

"The Master of the Rolls seems to have been misled into the opinion he expressed, in opposition to this high authority, by the supposed operation and effect of recent statutes, providing for the enforcement of Scottish judgments in England, and of English judgments in Scotland, and also for the more convenient ascertainment of the law of one part of the United Kingdom by a Court in another part.

"By what is known as 'The Judgments Extension Act,' 31 & 32 Vict., c. 54, a judgment of a Court of Common Law in England for debt, damages, or expenses (*but not an order or decree of the Court of Chancery*) may be enforced in Scotland by the party holding the judgment producing to a registrar in Scotland a certificate of the judgment, and having it registered. And, *e converso*, a judgment by this Court for debt, damages, or expenses (but not any other kind of order or decree) may, by a corresponding proceeding, be enforced in England. But this gives no jurisdiction to the Scottish Court in the matter of the English judgment, nor jurisdiction to the English Court in the matter of the Scottish

judgment; the one remains an English judgment throughout, though endorsed, so to speak, by a Scottish official under the authority of the statute, and the Scottish judgment also remains throughout a Scottish judgment, though endorsed by an English official under the like authority.

"The 22 & 23 Vict. c. 63, 'to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof,' provides, in effect, that in any suit or proceeding, when the facts are ascertained, a case may be submitted by a Court in Scotland to a Court in England to ascertain the law of England applicable to such facts, or by a Court in England to a Court in Scotland to ascertain the law of Scotland applicable to such facts. But how the passing of such an Act can affect the jurisdiction of any of the Courts in Scotland or England, or their relation to one another in the matter of jurisdiction, does not at all appear.

"These very convenient reciprocal provisions for the enforcement of Scottish judgments in England and English judgments in Scotland, and for the more convenient ascertainment by any Court of the law which that Court does not judicially know or administer, are authorised by Acts of the Imperial Legislature of the United Kingdom. But the same reciprocal advantages and conveniences might be brought about in the case of English and French Courts, or of Scottish and Dutch Courts reciprocally, not indeed by an Act of the Parliament of the United Kingdom, but by treaty or convention; and it could hardly be contended that the effect of such treaty or convention would be to affect the relation of these Courts to one another in a conflict of jurisdiction. Of this there could not be a more instructive or apposite illustration than is to be found in 24 & 25 Vict. c. 11, which is intended to extend the benefits of the 22 & 23 Vict. c. 63 to cases in which any of the Courts of the United Kingdom require to ascertain the law of another nation, 'with the Government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or State, when pleaded in actions depending in any Courts within Her Majesty's dominions, and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State.'

"It would, in my opinion, be a waste of time to say more as to the relations in which the Chancery Division of the High Court of Justice in England and this Court stand to one another, or in

support of the general proposition that, by virtue of the Treaty of Union, the judicatories of England and Scotland are as independent of each other within their respective territories as if they were the judicatories of two foreign States. I therefore proceed, in the second place,

"II. To inquire what are the grounds on which the jurisdiction of each of the two Courts to deal with this trust-estate is maintained.

"Prior to the passing of the Confirmation and Probate Act of 1858, to the effect of which I shall more particularly advert, the portion of Mr. Orr Ewing's personal estate which was locally situated in England must have been taken up and administered by the defenders under English letters of probate, while the remainder (being the great bulk of the personal estate) would have fallen within the Scottish confirmation. To such a state of circumstances the law laid down by Lord Chancellor Cottenham, in *Preston* v. *Melville*, would have been clearly applicable. The personal estate in that case was situated partly in Scotland and partly in England, but the great bulk of it was in England. The trustees appointed by the testator having declined to act, the Court of Session appointed new trustees to act in their place; but that appointment did not confer on the new trustees the office of executors-nominate, which the testator had conferred on the original trustees. Therefore, Lady Baird Preston, as the person chiefly interested in the succession, administered the whole personal estate as next-of-kin. Obtaining confirmation in Scotland and letters of administration in England, she handed over the whole of the Scottish personalty to the trustees for the purposes of the trust, but declined to part with the personalty in England, until she and her sureties in the Prerogative Court should be discharged by that Court, or some other competent Court in England. The trustees, on the other hand, contended that her ladyship was bound to hand over to them, absolutely and immediately, for the purposes of the trust, the whole assets belonging to the testator at the time of his death, wherever situated, and by what title soever she held or had acquired them. Lord Cottenham decided in favour of Lady Baird Preston, on grounds which appear to me to be irresistible. The general rule which he enunciated, and which has often been quoted, is that 'the domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased.' But the

reason which his Lordship assigns for this rule is not less important than the rule itself. 'By the law of England the person to whom administration is granted by the Ecclesiastical Court is by statute bound to administer the estate and to pay the debts of the deceased. The letters of administration under which he acts direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration.' And it may be added that the Prerogative Court require the administrator further to find sureties (in the case of Lady Baird Preston to the amount of £360,000) for the full performance of these duties. To pay over the English funds to be administered by the Scotch trustees, his Lordship holds, would be 'to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country.' But when the English personal estate has met all its obligations in England, his Lordship does not doubt that the residue, if any, will be payable to the Scottish trustees.

"Now, applying the rule established or declared in *Melville* v. *Preston* to the present case, where the personal estate with a small exception is situated in Scotland, and possession of it has been taken and held there by the defenders under the lawful authority of the confirmation of the Commissary of Dumbarton, it follows that the administration must be in this country. They have given up a full and true inventory on oath of the whole effects of the deceased, and have undertaken that they will well and truly administer the estate, and pay the debts of the deceased, and render just count and reckoning for their intromissions.

"Then how is this duty and obligation to administer the estate in Scotland affected by the circumstance that the deceased had also personal estate to a comparatively trifling amount in England? Prior to the Act of 1858, of course, it would have been necessary for the defenders to obtain probate in the English Court, to give them a legal title to uplift the English personalty; and this portion of the estate they would, on Lord Cottenham's principle, have been bound to administer in England. If there were any English debts, they must be satisfied in the first instance. If there were any directions in the testator's settlement that required to be performed in England, these would next fall to be provided for. But after these debts had been discharged and these purposes fulfilled, the plain duty of the defenders would have been to combine the

residue of the English with the Scottish part of the estate, and to administer the combined estate in Scotland as a whole according to the directions of the testator.

"The object of the ancillary administration in England would, of course, have been to obtain a legal title to the English funds; and this could not have been obtained by the defenders without an undertaking to administer and account in England. But as soon as they had satisfied all just claims in England out of the estate there situated, they owed no further duty to any party or to any Court in England.

"All this is very clear on general principle; and it would have been still clearer in its application to the circumstances of the present case if the defenders had required to obtain and had obtained letters of probate from the English Court. For there were no English creditors of the deceased, and there were no purposes of his settlement which were to be carried into execution elsewhere than in Scotland. In such circumstances, it appears to be the opinion of all jurists, as is successfully demonstrated by the Lord Ordinary, that even if the ancillary title of administration is in a different person from that of the principal administration, the simple duty of the ancillary administrator is to remit the funds which he has recovered to the principal administrator.

"It is unnecessary to follow this theme further in the way either of argument or illustration, because it appears to me that in the present case the title of administration possessed by the defenders is, by force of the statute 21 & 22 Vict. c. 56, a purely Scottish title, comprehending a title to administer the English funds, to the same effect as if they had been locally situated in Scotland.

"The title and preamble of the statute plainly announce the purpose of the Legislature to be, to extend over the United Kingdom the effect of a confirmation in Scotland, and of grants of probate and administration in England and Ireland. The one condition required to make the statute applicable is, that the person whose estate is to be administered shall have died domiciled in that part of the United Kingdom in which the confirmation or grant of probate or administration is obtained. The object of the statute was to secure economy, and also simplicity and unity of administration, and, with this end in view, to do away with the necessity of ancillary administration as regards the three parts of the United Kingdom.

"The 9th section enacts that 'It shall be competent to include in the inventory of the personal estate and effects of any person

who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both, provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall, by his interlocutor, find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile; provided also that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.'

"Section 12 enacts that, 'When any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England, as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.'

"It cannot be disputed that this section of the Act gives to the Scottish confirmation extra-territorial operation and effect. But it has been argued that the words of this section giving to the confirmation, when sealed by an officer of the Probate Court, 'the like force and effect in England as if a probate, &c., had been granted by the said Court,' subject the confirmed executor to all the same liabilities, duties, and jurisdiction as if he had actually obtained a grant of probate in England. To this reading of the statute I cannot assent; and my reasons will be most readily understood by a reference to the proceedings in the present case, which, it is not disputed, are strictly in accordance with the provisions of the statute.

"The defenders having in the Commissary Court of Dumbartonshire given up on oath an inventory of the whole of the deceased's personal estate, including the funds and effects situated in England, as well as those situated in Scotland, and having exhibited to the Commissary the trust-disposition and settlement of the deceased,

the Commissary pronounced his deliverance, confirming the nomination of the defenders as executors, and giving them 'full power to uplift, receive, administer, and dispose of the said personal estate and effects (*i.e.*, the estate and effects contained in the inventory, both Scottish and English), to grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do, that to the office of an executor-nominate is known to belong.'

"Now, this is the sole grant of right to administer the estate of the deceased which the defenders have obtained. They require no other. No doubt, to give it the effect of an active title to recover from English debtors, or to uplift English funds, the seal of the Probate Court of England is directed by the statute to be impressed upon it. But the official of the Probate Court cannot refuse to impress the seal. He has no discretion in the matter. His act is not judicial, but a mere statutory formality. The seal is impressed, not because the Probate Court, or its official, has seen the nomination of the executors, or the inventory of the estate, or the oath of the executors confirmed, not because the executors have taken any oath in the Probate Court, or undertaken any duties in that Court, or found there any security for their just and true administration, but simply and solely because the officer of the Probate Court has had presented to him what bears to be a confirmation sealed with the seal of the Commissary of Dumbartonshire, together with a certified copy of the interlocutor of the Commissary, pronounced in terms of the statute. He, as ordained by the statute, affixes the seal which gives the confirmation force and effect in England, solely because the Commissary of Dumbartonshire has given the executors the power and right to ingather that portion of the estate which is situated in England. And, after the seal is impressed, the statute requires that the confirmation shall be 'returned to the person producing the same,' so that neither the confirmation nor the sealing of it is required to be made matter of record in the Court of Probate. To hold that the Scottish confirmation when sealed, and because it is sealed by the officer of the Probate Court, becomes an English grant of probate in a question of jurisdiction, seems to be much the same thing as it would be to hold that a judgment of an English Court registered in Scotland, and put to execution there under the Judgments Extension Act, becomes in a question of jurisdiction a judgment of a Scotch Court.

"I am of opinion that the effect of the statute of 1858, and of a confirmation under the statute embracing English personal estate in the inventory given up on oath to the Scottish Commissary Court, is to enable the executors to administer the English estate along with, and as part of the Scotch estate, and to exempt the executors from being subject to English jurisdiction by reason of a part of the executry estate having been locally situated in England at the death of the testator. And I am confirmed in that opinion by a provision in another later statute, 30 & 31 Vict. c. 97, 'to facilitate the administration of trusts in Scotland.' The fifth section of that Act empowers trustees, acting under any Scotch deed of trust, to invest the trust-funds, 'in Government stocks, public funds, or securities of the United Kingdom, or stock of the Bank of England,' but adds this proviso, 'that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of Her Majesty's Superior Courts of Law or Equity in England or Ireland, either as trustees or personally, by reason of their having invested or lent trust-funds as aforesaid.' This proviso is a proper complement of the Confirmation Act of 1858, as I read it. But if the truster's possession at the period of his death of any personal estate in England would have the effect of subjecting the trustees and the whole or part of the trust-estate to the jurisdiction of English Courts, it can hardly be supposed that this carefully worded proviso would have found a place in the statute.

"Another argument of the defenders is founded on the circumstance, that when the administration suit was commenced in the English Court there was no corresponding suit, and no suit of any kind, depending in this Court affecting the trust-estate; and reference was made to the established rules respecting jurisdiction in bankruptcy, where a trader has creditors in different parts of the United Kingdom.

"I do not stop to point out the obvious distinction in principle between the administration of a bankrupt estate by a trustee or assignee in bankruptcy, and that of the estate of a solvent person deceased by trustees and executors appointed by himself. The analogy does not aid the defenders at all. If a bankrupt have only one trading domicile, the distribution of his estate among his creditors must be in the Court of that domicile. But when the bankrupt has two trading domiciles (and in that case only), the process of distribution of the estate may be instituted in either domicile; and when it has been instituted in one of the domiciles,

and the estate has become vested in a trustee or assignee, the jurisdiction of the Bankruptcy Court of that domicile is exclusive of the other. This was settled by Lord Eldon in *Selkrig* v. *Davies and Salt*, 2 Dow, 230, and was given effect to in *Goetze* v. *Aders, Pryer, & Co.*, 2 Ret. 150, and the *Phosphate Sewage Company* v. *Lawson's Trustee*, 5 Ret. 1125. But there is nothing here analogous to two trading domiciles. The domicile of the testator (so far as that affects the question) was in fact in Scotland, *and was fixed as Scottish for confirmation purposes by the decree of the Commissary, under the authority of the statute.*

"The defenders further say that there is no example of an interdict being granted by this Court to prevent persons subject to the jurisdiction of this Court obeying the order of the Chancery Court of England, in a suit in which these persons are defendants. This is a mistake. There is a very clear and instructive example of it in the case of *M'Lachlan* v. *Meiklam and Others*, 19 D. 960. One cannot be surprised that such cases are of rare occurrence; because, fortunately, it is seldom that the Courts of two parts of the United Kingdom come into conflict. When that does occur an adequate remedy will always be found.

"Lastly, the defenders contend that the orders of the Chancery Division having been affirmed on appeal by the House of Lords, this Court is bound by that judgment on appeal, because the House of Lords is the Court of ultimate resort for every part of the United Kingdom. This would be a very formidable defence, if it were not founded on a fallacy.

"I recognise without hesitation the position of the House of Lords as the Court of ultimate resort, in the fullest sense, for the whole three parts of the United Kingdom; and I had occasion, in the very remarkable case of *Virtue* v. *the Commissioners of Police of Alloa* (1 Ret. 285), differing from some of my brethren, to express myself in the following words:—'I think it is an error in constitutional law to represent the House of Lords as sitting at one time as a Scotch Court, and at another time as an English Court. That House, I apprehend, sits always in one character—as the House of Lords of the United Kingdom, and as such, the imperial Court of appeal for the whole three parts of the United Kingdom. It has occasion to administer at one time the law of Scotland, at another the law of England, and at another the law of Ireland. But, in appeals coming from all the three countries, it has also to deal with principles of law that are common to the whole three.' If this be sound, the corollary is manifest. This Court is bound

by the judgments of the House of Lords in cases of the last description as authorities, even though the judgments may have been pronounced in English or Irish appeals, just as much as it would be by judgments pronounced in Scotch appeals. But it is otherwise when the House is administering a law different from or antagonistic to the principles of the law of Scotland. There the judgment on appeal is no more binding on this Court than the judgment of the Court of first instance, from which the appeal comes.

"In the present case, the judgment of the House of Lords would not have been pronounced in the terms which are before us had it not been for the rules and precedents of the English Court of Chancery. A long practice in any of the Courts of the United Kingdom cannot be disregarded by the House of Lords without serious inconvenience. But such practice can have no influence whatever on the independent judicatories of another part of the United Kingdom, or on the House of Lords sitting in review of their judgments.

"The pursuers by this action demand that the administration of the estate of the late Mr. John Orr Ewing shall take place in Scotland, according to the provisions of his trust-disposition and settlement, and to this I think they are entitled *ex debito justitiæ*, because there are no rules or principles of international law or Acts of the Imperial Parliament which require them to submit to have the administration in any other country.

"If the defenders, as trustees and executors, had voluntarily proposed to remove the estate and its titles and securities out of Scotland, for the purpose of carrying on the administration elsewhere, it will hardly be disputed that the pursuers would have been entitled to interdict to prevent this being done. The defenders are not acting voluntarily, but they propose to do the very same thing, in obedience to the orders of the Chancery Division in England. But this cannot alter or prejudice the rights of the pursuers, unless the orders of the Chancery Division are binding on the pursuers, which, for the reasons already given, I think they are not. One cannot but sympathise with the defenders in the very embarrassing position in which they are placed, from no fault of their own; but no considerations of this nature can be allowed to influence the Court in judging of the pursuers' right to the remedy they ask by the conclusions of their summons.

"I propose to your Lordships that judgment should be given in

terms of the declaratory conclusions; and as regards the other conclusions, it appears to me that the most appropriate and effectual remedy is to sequestrate the trust-estate, and (without removing the trustees from office) to appoint a judicial factor, with all the powers conferred on the defenders by the trust-disposition and settlement, to hold and manage the estate and distribute the same according to the directions of the deceased truster. The effect of this will be to relieve the trustees, for the present, of all charge of the estate, and to suspend all action on their part as trustees and executors; but the sequestration need not be permanent, if the trustees shall hereafter find themselves in a position to resume their duties of administration without interference from the Chancery Division. The course which I propose is in accordance with the practice of the Court when testamentary trustees become from any accidental cause temporarily disqualified to administer the trust; and it is in my opinion at once the most effectual remedy in the pursuers' interest, and the most appropriate to the unfortunate position in which the defenders are placed."

Lord DEAS said :—

"I have read and carefully considered the opinion proposed to be delivered in this case, and which has now been delivered by your Lordship, the Lord President, and I entirely concur in it.

"In particular, I cannot entertain any doubt that under the Treaty of Union the judicatories of Scotland and of England are as independent of each other in their respective territories, as if they were the judicatories of two foreign States.

"Neither can I entertain any doubt that the effect of the affirmance by the House of Lords upon appeal of the orders issued by the Chancery Division in England cannot be to give them any higher force or effect in Scotland than as orders, regularly issued in conformity with Chancery rules and practice in themselves possess. In this respect, I regard the effect of that judgment of affirmance as *toto cœlo* different from the effect which the reversal by the House of Lords, under Lord Cottenham as Chancellor, had upon the judgment of the Court of Session in the action brought against my then client, Lady Baird Preston at the instance of Sir Robert Preston's trustees. It is material, in order to show this, to trace the proceedings in the action which led to that appeal.

"The Lady Baird Preston, who was my special client in those days, and may be identified as the relict of General Sir David

Baird, who overthrew Tippoo Sahib, and took Seringapatam, was the eldest of three nieces of Sir Robert Preston of Valleyfield, who survived him; and after his death, which occurred on 7th May, 1834, she obtained confirmation as his next-of-kin and executrix in Scotland, and letters of administration from the Probate Court of Canterbury as his administratrix-at-law in England. In the latter capacity she took possession of the deceased's large personal estate in England, which she declined to make over to his trustees, surrendering however to them his comparatively small estate in Scotland.

"Sir Robert's trustees thereupon brought against her in the Court of Session the action to which I have alluded, concluding, *inter alia*, that she ought to be ordained to make over to them the whole personalty situated in England, to be administered by them in accordance with Sir Robert's trust-deed and settlement.

"The Court of Session pronounced a judgment, which was, *inter alia*, substantially to the effect just stated, namely, that she should make over to the trustees the whole personal estate of Sir Robert situated in England.

"Against this judgment an appeal was taken by Lady Baird Preston to the House of Lords.

"I prepared the appeal case lodged for her Ladyship, which has been preserved with the Court of Session Record and other relative papers in the Advocates' Library, from which, taken in connection with the judgment, it will be seen that there can be no doubt at all that all the matters involved in it of fact and of law were competently and finally adjudicated upon under that appeal by the clear and comprehensive judgment delivered by Lord Cottenham, then Lord Chancellor. When I say his judgment was final and conclusive, of course I mean only as between the parties then before the House.

"At the same time, the judgment, while it took a form calculated to carry with it general authority, unquestionably formed a precedent of the greatest possible weight, which may safely be followed under circumstances so analogous as those now before us, in which the great leading question is, whether we ought to allow the large funds of the deceased, which have been lawfully reduced into possession in Scotland, to be carried to England, or elsewhere, in order to be there dealt with by different rules and laws from our own.

"I am, unfortunately, the only survivor of the counsel who in March, 1841, appeared and pleaded along with me at the Bar of

the House of Lords on behalf of Lady Baird Preston, but I have a perfect recollection of all that then took place, including the law laid down, and I can readily supplement from my memory whatever may be thought to be imperfectly reported or recorded, in reference to the matters then in question.

"I think that the precedent of that judgment, in the absence of all authority to the contrary, is of itself conclusive upon that question, which, as I have said, is really the leading question in this case.

"If we are right in this, it follows that we ought to take measures for preventing what ought not to be allowed to take place; and as to what these measures should be, I agree with what your Lordship has proposed to us towards the conclusion of your opinion.

"I may add that it is within my personal knowledge that the soundness of that judgment was fully recognised by the able counsel of the English Bar who were then associated with me on the part of Lady Baird Preston, and when such of your Lordships as had a knowledge of the English Bar of that day see from the report who those counsel were, you will recognise that there were none who stood higher in the estimation of the public and the profession. It is in these circumstances that I venture to say that, although the judgment delivered by Lord Cottenham is only a precedent, a higher or more authoritative precedent for us in the present case could not possibly be found."

Lord MURE said :—

"I concur in the opinion which has now been delivered, and in the grounds of that opinion. The main question here raised is certainly a serious and important one, inasmuch as it involves a conflict of jurisdiction between the Courts of this country and the Chancery Division of the High Court of Justice in England, which Courts, as your Lordship has shown upon the highest authority, stand towards each other in the relationship of Courts of foreign countries in all matters of judicial jurisdiction. Such being the nature of the question, it has of course formed the subject of very anxious deliberation; and after carefully considering it in all its bearings, the conclusion I have come to is, that the pursuers are entitled to one or other of the remedies they ask under the conclusions of this action, in order to prevent the administration of this trust, in which they are deeply interested, from being removed from this country to England.

"The pursuers' interest in the trust-estate amounts to four-fifths of about £450,000; and having regard to the allegations made by the pursuers on the record as to the change in the mode of administration and management of the trust contemplated by the defenders, and the probable removal of the estate out of the jurisdiction of the Scotch Courts, which allegations are not seriously disputed by the defenders, it is clear that the pursuers have a very material title and interest to maintain that the administration of the estate should be continued to be carried on in Scotland.

"But the pursuers have not only a clear title and interest to maintain the Scotch administration; they have, in the view I take of their position, a right by the law of Scotland to have that administration carried on in Scotland, without interference on the part of any foreign tribunal.

"This trust is essentially a Scotch trust. It relates to the succession of a domiciled Scotchman. It must be administered in conformity with the provisions of a settlement framed according to the forms of Scotch conveyancing, and all disputes as to the terms of that settlement, or as to the distribution of the estate, must be ruled by the law of Scotland, as being the law of the domicile of the truster. The trustees, again, are also Scotchmen. The majority are permanently resident there, and they have been empowered to administer the estate in respect of a judgment or decree of the Judge of the Commissary Court of Dumbarton, pronounced after due inquiry as to the domicile under statutory authority, and whose jurisdiction in such matters was exclusive, and his judgment final. The estate, moreover, with the exception of a comparatively small amount, is locally situated in Scotland, and there are no debts due by the truster to any one in England.

"Such being the position and character of the trust, it is difficult to conceive any combination of circumstances less calculated to require the interference of a foreign Court with the Scotch administration. There is truly nothing foreign about the estate and the trust. Even the infant plaintiff in the Chancery proceedings is the son of a Scotchman, one of the trustees; but he is for the present apparently become the unconscious instrument in originating an unfortunate family litigation, under the direction of what is called a 'next friend,' who seems to stand in the very peculiar position of having instituted proceedings for bringing the Scotch trust into Chancery, in the first instance without authority from any of the infants whose names he used, and for his own

interest alone, as explained by your Lordship in the passage you have read from the judgment of the late Master of the Rolls.

"Now, the main grounds in law on which it humbly appears to me that the pursuers are entitled to have this Scotch trust-estate protected from the contemplated change of administration are—1*st*, That the whole estate has been placed, by the proceedings taken before the Sheriff-Commissary, in terms of the Statute of 1858, and by the judgments pronounced by him in the question of domicile, under the exclusive administration of the defenders, and that this administration, which includes, by the law of Scotland, both collection and distribution, must be carried on in Scotland; and, 2*nd*, that even if a similar question had been raised before the date of the Act of 1858 relative to a Scotch trust, in a case where ancillary administration had been obtained in England relative to the estate there, and it had been proposed, as here, to call upon the Scotch executor to account to the Court of the ancillary administration for the administration of the estate in Scotland, in the way the defenders have here been proceeded against, those Scotch executors would not, according to the ordinary and well-recognised rules of international law, have been entitled or bound to submit themselves to the jurisdiction of the foreign Court.

"With reference to the first of these questions, I concur entirely in the very full and able exposition which has been given by your Lordship of the meaning and effects of the rules and regulations introduced by that Statute for the amendment of the law relating to confirmation in Scotland, and for extending over the United Kingdom the effects of such confirmation, with reciprocal arrangements for England and Ireland. I feel it impossible to add anything to the weight of that exposition, and shall abstain from attempting to do so. But I think it right to say generally with reference to that Statute, that I have always understood that one of its main objects was to remedy the inconveniences which were frequently experienced from the necessity of separate confirmation and letters of administration, as the case might be, in each portion of the United Kingdom in which a deceased party might happen to have property, and to have the whole moveable estate embraced in the inventory dealt with as a *universitas*, and placed under one administration, both for collection and distribution, in the hands of an administrator in the country of the ascertained domicile of the deceased.

"Some of the inconveniences which thus arose were alluded to

in the opinion of the late Lord Justice-Clerk Hope in the case of the *Marquis of Hastings*, quoted in the opinion of the Lord Ordinary in this case, where his Lordship speaks of the advantages of having the estate of deceased parties managed as one *universitas* for collection and distribution, and of the inconveniences arising from having different administration in different countries, where he says, 'In principle it is clear that the party in whom the title of administration is vested should be the same in both countries, since in the foreign country it is only a title for collection, and not for final distribution.'

"One effect, therefore, of the Act of 1858, as explained by your Lordship, was to introduce the principles of the rule referred to in the above extract as to the working of Scotch confirmation, in the case of parties who died domiciled in Scotland, and to allow the whole estate included in the inventories to be administered as one *universitas* by the executors of the domicile, and within the Courts of the domicile by the law of which it falls to be distributed.

"But, assuming that the question had required to be disposed of apart from the provisions of the Act of 1858, and under the ordinary rules of international law applicable to such questions, I am of opinion with the Lord Ordinary that the pursuers are entitled to the protection they ask. On that point I entirely concur in the exposition of the law which the Lord Ordinary has given us in his very learned opinion, and have therefore very little to add. It appears to me that the various authorities he has referred to are conclusive in favour of the soundness of the conclusion which his Lordship has arrived at; and it struck me as remarkable that in the course of the discussion there was no leading writer on international law referred to as laying down any different rules from those on which his judgment has proceeded.

"The case of Lady Baird Preston seemed to be relied on in support of the defenders' contention. I am, however, unable to adopt this view, for it humbly appears to me to be a judgment doubly adverse in principle to the defenders. The judgment in that case was expressly limited to 'the property held by Sir Robert Preston in England.' The ground of judgment, as explained in the opinion of Lord Cottenham, was that 'administration must be in the country in which possession is taken and held, under lawful authority of the property of the deceased;' and as Lady Baird Preston had obtained possession of that property under letters of

administration in England, it was held that she could not be called upon to give it up to the Scotch trustees. Now, apply that rule to the circumstances of the present case. The defenders have taken possession, under a valid confirmation, of the whole moveable property in Scotland which belonged to the late Mr. Ewing, and are still in possession of that property for purposes of administration and distribution in Scotland. Upon the principle of the rule laid down by Lord Cottenham, they are bound to continue its administration in Scotland, under the jurisdiction of the Scotch Courts, and are not entitled to take the property out of Scotland, or hand over its administration to a foreign Court.

"It is the *situs*, therefore, of the property which in a great measure regulates the right to administer that property; and the grant of administration in the ordinary case is limited to the property situated in the country where administration was applied for; but when granted, it is not in the power of any foreign tribunal to interfere with that administration. That is, I think, clear from the opinion and decision of Lord Cottenham in Lady Baird Preston's case, which is a distinct authority in favour of what the pursuers here contend for.

"If the defenders, as your Lordship has remarked had proposed, of their own account, to remove the administration from Scotland to England, there could have been no serious question as to the pursuers' right to have such a proceeding stopped; and, in fact, that the defenders have been called upon to take this step on an order issued by the Chancery Division, cannot, in my opinion, be held to deprive the pursuers of the redress they ask.

"As regards the practice of Chancery, I agree with your Lordship that that cannot be held to rule or affect the present question. No case was referred to where such practice has, in a question of international law, been sanctioned or given effect to by the tribunals of any foreign country; and I am unable to see any good grounds on which, according to any sound rule of international law, such effect could be given to it.

"The Lord Ordinary has referred to certain clauses in the Articles of Union bearing upon this question, and since the case came before us, the pursuers have been allowed to add a Plea in Law to the Record founded on the 19th Article of that Treaty, which provides 'That no causes in Scotland be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall; and that the said Courts, or any other of the like nature, after the Union, shall have no power to

cognosce, review, or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same,' and which they maintain is or would be violated by the proceedings they complain of.

"In order to dispose of this plea, it is necessary to attend to the precise position the defenders are placed in with regard to the trust-estate in question, which, as I have already explained, is essentially a Scotch trust-estate. The defenders have been authorised, by the judgment pronounced by the Commissary Judge of Dumbarton, after due inquiry, in terms of the statute, into the facts necessary to enable him to decide this question of the domicile of the deceased, 'to uplift, receive, administer, and dispose of the personal estate and effects' of the late Mr. Ewing, 'and to grant discharges thereof.' This judgment is final, and the defenders have been, and are still, administering the estate under its authority, and according to the recognised rules of administration in this country, and under the jurisdiction of the Courts of Scotland. While so administering the estate in Scotland, proceedings were taken against them in the Chancery Division in name of a beneficiary and 'next friend,' in which a claim is made 'That the personal estate of the testator, John Orr Ewing, deceased, may be *administered*, and that the trusts of his will or testament, and codicils thereto, may be carried into execution by and under the direction of the Courts,'—viz., the Chancery Division. And on the 29th November, 1882, 'the Court declares that the trusts of the will or testament and codicils thereto, of the testator, John Orr Ewing, of Glasgow, North Britain, deceased, ought to be performed and carried into execution, and doth order and adjudge the same accordingly,' and a further and full inquiry and account is directed to be made in the Chancery Division with a view to a due course of administration, as set out in the tenth article of the condescendence, and this order is served on the defenders in Scotland.

"Here, therefore, there is a direct demand made by the plaintiffs upon the defendants to bring up a Scotch estate, which they are in the course of administering under the jurisdiction and authority of the Courts in Scotland for administration in the Court of Chancery, and in order that the whole affairs of the late Mr. Ewing may be inquired into, or, in other words, 'cognosced,' in that Court, and the administration removed from Scotland to England. That this is against the spirit and policy of the 19th article of the Treaty of Union cannot, in my opinion, admit of doubt. But

I am also disposed to think that it comes under the words of the prohibition.

"The subject-matter in dispute is a Scotch estate which has been appointed to be administered in Scotland by Scotch trustees, and is being administered after the manner in which such administration is carried on in Scotland, as fully explained by your Lordship. In these circumstances the Court of Chancery call upon these trustees to come and have the articles administered in Chancery according to the rules of that Court. This, in the view I take of it, is substantially an interference with a Scotch cause, and making allowance for the somewhat quaint phraseology of the time used in 12th article, the proceeding appears to me to amount to an attempt to 'cognosce' a Scotch cause in the Court of Chancery, and in doing so, to 'remove or alter the acts of a judicatory within Scotland and stop the execution of the same.' That is to stop the carrying out of the order for administration pronounced by the Sheriff-Commissary of Dumbarton. On fair construction, therefore, it humbly appears to me that what is here sought to be prohibited is covered by the express words of, in addition to being adverse to the spirit of, the 19th article of the Treaty of Union.

Lord SHAND said :—

"I am also clearly of opinion that the pursuers are entitled to succeed in their demand for decree of declarator and interdict in terms of the conclusions of the summons, and that, in the very special circumstances of the case, the Court ought in the meantime, but I hope as a temporary measure only, to sequestrate the trust-estate and appoint a judicial factor to execute the purposes of the trust exclusively in this country, the factor being liable, as an officer of this Court, to account directly to the Court for his administration.

"I feel myself relieved from the necessity of entering at length and in detail into the legal grounds on which the judgment of the Court is rested. Indeed, any attempt to do so would simply involve a repetition of much that has been already said. I entirely adopt the views expressed in the learned and exhaustive opinion which your Lordship has delivered, and the Lord Ordinary has supported his judgment by powerful reasoning and a full citation of authorities in a careful and elaborate opinion, in which the various points maintained, excepting the special arguments founded on the terms of the Confirmation and Probate

Act of 1858, are fully discussed. I shall content myself, in these circumstances, with some observations merely with the view of summarising my opinion on the leading points on which, as it seems to me, the judgment must rest. First, the pursuers have made out a clear interest as well as a valid title to insist in their demand that this Scottish trust-estate should be administered in this country, which is at once the domicile of the deceased and the country within which, to all intents and purposes, the estate is situated, and within which the trust purposes have to be executed. Fortunately for those who are interested in such estates, the management in Scotland, extra-judicial in its character, is most simple and economical, the trustees being permitted and bound to administer the trust without interference by the Court, although entitled to the assistance of a law-agent. It is not said that any legal questions have arisen in the management requiring an appeal to the Court, or that in the administration of the trust anything has occurred to cause either embarrassment or expense or delay. It is quite obvious, on the other hand, and indeed it is not disputed, that if the trust-estate is to be managed by the Court of Chancery in England, inconvenience, delay, and expense, entirely unnecessary and unjustified by any exigency that has arisen, will be the result. It is only necessary to read the order of the Chancery Division of the High Court of Justice in England of 29th November last, directing detailed accounts and inquiries to be taken and made on the various matters therein enumerated in reference to the trust-estate, in order to see that considerable expense must be caused by the administration in that Court. The appointment of a separate agent for the trust in England, in addition to their law-agent in this country, and the fact that no payments can be made by the trustees without a reference to the Court of Chancery for authority, must necessarily cause embarrassment, expense, and delay; and it would be difficult, if indeed possible, to specify a single benefit or advantage which would be gained as the counterpart of these disadvantages. Second, the defenders have maintained that this Court is bound to follow the decision of the House of Lords which confirms the order of the Court of Chancery, directing that the administration of the trust-estate should be carried out in that Court, as an authority deciding the whole questions in dispute; and if there be a decree of the House of Lords which finally settles the matters raised by the present action, there would, of course, be an end to all further argument in the case. I agree with your Lordships and the Lord

Ordinary in holding that the judgment of the House of Lords is not of that nature. That House, as a Court of final resort, has, at different times, in appeals coming before it, to determine questions of purely Scottish law, questions of purely English law, and questions common to the law of both countries. It is only, however, in cases of this last class that it can be represented that the Courts alike in England and Scotland must regard the decisions of the House of Lords as authoritatively binding on them. At one time the House of Lords may be dealing with a question of Scottish conveyancing, or of Scottish entail law, and it is obvious that decisions on these matters would be of authority only in this country. Again, a decision on a question arising under the statute of limitations in England, or dealing with a question in which the law of England has its own peculiar rules—as, for example, a question of servitude of right or the like could not be regarded as settling any question of law in this country; while on many questions of mercantile law, or questions as to the interpretation of British statutes, the law announced in the House of Lords must receive effect throughout the whole United Kingdom. It seems to me to be obvious that in the decision founded on by which the House of Lords confirmed the order of the Court of Chancery, their Lordships were dealing with a matter of purely English law and practice only. Their judgment related to the practice of the Court of Chancery, and proceeded to a great extent, if not entirely, on the peculiarities in that practice, and the length of time for which the practice had existed. I think this is practically stated in the opinions of Lord Blackburn and Lord Watson, and that in parts of the opinion of the Lord Chancellor the same view is presented. Should the decision in this case be appealed the question to be determined will be not a matter of mere practice either of this Court or of the Court of Chancery, but whether, having regard to the special provisions of the Confirmation and Probate Act of 1858, or alternatively according to sound and recognised principles of international law, the Courts of this country are bound to give effect to the practice of a foreign Court, in violation of these principles, and under which it is sought to transfer the entire administration of a Scottish trust-estate, duly administered by Scottish trustees, to another country, thereby causing serious expense and inconvenience to the whole parties interested. On that question it appears to me that the House of Lords, in affirming the order of the Court of Chancery, has as yet pronounced no opinion. Third, In one sense it may be and would be inaccurate to speak of England as a foreign country,

and the Courts of England as foreign Courts, for England and Scotland are parts of our kingdom; but there can, I think, be no doubt that so far as the judicatories of this country are concerned, the principle stated by your Lordship is undoubtedly sound, that these are as independent of each other within their respective territories as if they were judicatories of two foreign States. Nothing can more clearly support that view than the provisions of Article 19 of the Treaty of Union, which not only provides for the maintenance and preservation of the Courts of this country, with the full authority which they have always claimed and exercised, but expressly enacts that 'no cause in Scotland shall be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Courts in Westminster Hall,' and that 'the said Courts, or any other of the like nature after the Union, shall have no power to cognosce or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same.' The Judgments Extension Act, 31 & 32 Vict. c. 54, only confirms the view that the Courts of Scotland and England are as independent of each other as if they were judicatories of two foreign States. Before that Act was passed, the judgments of English Courts were examinable and examined in this country in the same way as the decrees of any foreign tribunal. Such decrees afforded only *primâ facie* evidence of the truth and justice of a pursuer's claim (*Southgate* v. *Montgomerie*, 1837, xv. S., 507; *Whitehead* v. *Thompson*, 1861, 23 D, 772), and the judgments of Courts in this country were treated in the same way by the Courts in England. The Imperial Legislature has, by the statute now referred to, made no change, so far as regards the Court of Chancery in England, for the provisions of the statute are limited already, so far as England is concerned, to judgments of Courts of Common Law in England for debt, damages, or expenses; and the order of the Court of Chancery is thus, to all intents, in the same position as the decree of a foreign Court. Fourth, assuming then, that the order of the Court of Chancery is to be regarded in the same way as an order of the Court of France or any other foreign country, the question arises, To what extent ought this Court to give effect to it? The answer to be given appears to me to be very clear. The laws of all civilised States seem to recognise the existence of an ancillary administration of the estates of a deceased person as extending over the property of the deceased situated within the foreign territory,

while the principal administration belongs to the country of the domicile of the deceased according to the law of which all questions of succession must be determined. The Court of Chancery stands quite alone in its rule or practice by which the principle administration is, I may say, appropriated although the estate and domicile of the deceased are situated in another conntry. It seems to me that this Court is bound to disregard any such practice, and, when appealed to by parties whose interests are seriously prejudiced, is not only bound to refuse its aid in the execution of an order of such as is here complained of, but, if necessary, to grant a decree which will prevent that order from being carried into effect in this country. If one of the supreme Courts in France or in the United States of America were to grant an order for the transference of the whole funds of a Scottish trust-estate to the territory of that Court, even where the domicile of the estate of the deceased and the domicile of the trustees were all in this country—a supposition, perhaps, scarcely admissible, for in those countries it is clear that the principles of international law on this subject are carefully observed—I cannot doubt that this Court would decline to give effect to the order, and would, by the necessary order or decree, support the executors or trustees of the deceased in maintaining their right to administer the trust in this country; and I should be surprised to learn that the Courts in England would act differently. I see no reason for holding that the order of the Court of Chancery is to receive any higher effect than the order of the foreign Court in the case supposed. It appears to me, further, that apart from the stream of authorities on the principles of international law to which the Lord Ordinary has referred, and which are conclusive of the matter, the case of *Preston* v. *Melville*, a decision in the House of Lords in a question appealed from the Courts in Scotland, is a direct authority in favour of the pursuers' contention. In that case possession of the deceased's personal estate in England, taken and held under the English probate, was held to give right to the administration in England, at least in the first instance. It was so held, although the domicile of the deceased, and the principal administration were in this country. Lord Cottenham, while holding that the administration of the estate must remain, in the first instance, in England, added, however, that, 'If, after such administration shall have been completed, any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert

Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers' (the trustees acting under the deceased's settlement in Scotland, the country of the deceased's domicile) 'for the purpose of being applied in the performance of such trusts.' In a subsequent part of the judgment his Lordship refers to the right of the trustees to the funds in England as a right which will not emerge 'until the administration shall have been completed in England, and the surplus ascertained.' In the end, the funds which the deceased had directed to be applied in the purchase of lands to be entailed in Scotland were disentailed in an application which was brought originally before myself as Lord Ordinary, and was ultimately disposed of by a Court of seven Judges (see Petition Bruce, 6th March, 1874, 1 Ret. 740), and the money was ultimately directed to be paid over to Robert Preston Bruce, in whose favour the decree of disentail had been granted by an order by Vice-Chancellor Malins, a copy of whose judgment to that effect is now before me, dated 20th June, 1874. If the mere fact that the funds were situated in England, and that the title of administration, therefore, taken out in that country, gave the right of administration there, it follows *a fortiori* in such a case as the present, where not only the funds or estate sought to be removed from Scotland are situated there and possessed under the Scottish title of confirmation, but where Scotland is the country of the deceased's domicile, and therefore the country of the principal administration—in which, indeed, he directed his trust purposes to be fulfilled—that this Court, and as it humbly appears to me, the House of Lords, following their decision in the case of *Preston*, must order that the estate of the deceased in Scotland ought to be administered by the defenders, by virtue of the decree of confirmation obtained by them from the Commissary Court. Indeed, the very words of the order of the House of Lords in the case of *Preston* might safely and properly be adopted in this case, altering only the names of the parties, and substituting the term decree of confirmation for letters of administration. Fifth, but for the reason fully stated by your Lordship, I am further of opinion that even the principle of ancillary administration which applies in the case of foreign States, and which held good as between England and this country prior to 1858, has no longer any application. The effect of the Confirmation and Probate Act of 1858 has been, I think, to do away entirely with the ancillary administration of trust-estates as between Scotland and England, so that the country

or the domicile of the deceased in which either the Confirmation or the Letters of Probate, as the case may be, are taken out, is now not only the principal but the sole place of administration of the estate. It seems to me to be the result of the provisions of that statute that creditors, legatees, heirs, or next-of-kin claiming an interest in a trust-estate must have recourse to the country of the deceased's domicile, in which the estate is being administered under the title there taken out. It is to be observed that the terms of this statute with reference to the effect of the title of administration, as distinguished from the decree fixing the domicile of the deceased, do not appear to have been the subject of argument in the House of Lords in the appeal from the order of the Court of Chancery, and were not specially adverted to before the Lord Ordinary. The provisions of the statute and the terms of the schedule containing the forms of decrees to be granted by commissaries seem to me to make it clear that the title to administer the whole estate of the deceased, in the case of a person who dies domiciled in England, is contained in the Letters of Probate granted in England; while, in the case of a person dying domiciled in Scotland, the title to administer is contained in the confirmation by the Commissary. I refrain from a reference to the different sections of the Act of Parliament, for these have been already adverted to by your Lordship. I will only observe that the terms of the decree of confirmation seem to be conclusive, for the form of that decree is a narrative, that the executor has 'given up on oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland (*or situated in Scotland and England, or situated in Scotland, or situated in Scotland, England, and Ireland, as the case may be*), amounting in value to pounds, which inventory has likewise been recorded in my Court-Books of date, and he has likewise found caution for his acts and intromissions as executor,' and the effectual operative part of the decree gives full power to the executor 'to uplift, receive, administer, and dispose of the said personal estate and effects, that is, the effects in all the three countries, and grant discharges thereof,' &c., providing always, 'that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required,' a clause which, it may be observed in passing, is analogous to the clause in letters of probate on which Lord Cottenham's observations in the case of *Preston* v. *Melville* were founded. The seal of the Court of Probate is an official formality, only

designed to give debtors the security of knowing that the decree of confirmation is genuine, and has been recorded as such in the Registry of Probates. It seems to be expedient and desirable, so far as regards the whole of the United Kingdom, that creditors, legatees, and others should be required to resort to that part of the kingdom in which the deceased had his domicile as the place of administration, in place of having a principal and an ancillary administration in different parts of the kingdom; and this object has been, I think, effected by the statute. Sixth, it has been observed in argument, that if there had been an administration suit in this country, or anything equivalent to it, before the proceedings in the Court of Chancery were initiated, the decision of the Court of Chancery would probably have been different, and that respect would have been given to the fact that the estate was already the subject of legal proceedings in this country. I have no means of forming an opinion whether even in that case the Court of Chancery would not still have granted an order for the administration of the estate by that Court; but it must be observed that no such proceeding as an administration suit, such as is common in the Court of Chancery, is known in this country. An action of accounting, or, as it is frequently called, of count, reckoning, and payment, can only be maintained when there is really a refusal, or failure, on the part of the trustees to account, or a necessity for litigation to settle legal questions which have arisen. If, then, the absence of an administration suit in this country is a reason for the Court of Chancery in England undertaking the administration of Scottish trust-estates, it would appear to follow that, provided the trustees happen to be within the jurisdiction of the Court by temporary residence, or to be liable to service under the rules of the Court of Chancery, there will be nothing to prevent the transference of the administration of proper Scottish trust-estates from this country to England at the suit of any one who can substantiate an interest in the estate. Again, it is said that the Court of Chancery acts *in personam*, and so will compel a defendant within its territory to fulfil his duties, or, rather, his legal obligations. I venture humbly to think that this is no peculiarity of the Court of Chancery. I apprehend that the Courts of this country act in the same way, and on the same principle. In every action for the payment of money or the performance of some act by a defendant, the Court acts *in personam*, and in order to compel the fulfilment of a legal duty or obligation. But, to take

the case on hand, the carrying out of that principle cannot dispense with the necessity for the Court having jurisdiction to grant the decree asked on recognised principles of international law; and at least this must be so where the decree is to receive effect in another country. If the duty and legal obligation of a defendant trustee and executor be that of administering a Scotch executry or trust-estate in Scotland, and he is not only ready and willing to perform that duty, but is in due course of doing so, the fact that the Court of Chancery proceeds *in personam* seems to afford no reason or principle for destroying the existing obligation to account to the proper Courts, in the proper country of administration, and creating a new obligation to remove the whole administration to another country. This may, no doubt, be characterised as a proceeding *in personam*, because the order of the Court may be enforced by diligence against the person; but if the order itself be one in violation of sound principles of international law, the proceeding *in personam* becomes one of might and not of right; and the order is one which will be properly disregarded when it is sought to be enforced or carried into effect in another country. The Courts of this country, in such cases, though proceeding *in personam*, have been in use invariably to decline to undertake, or to order administration in Scotland, and to require that resort shall be had to the country of domicile of the deceased in which the executor's title has been completed, and where the administration is being properly carried on. The case, of course, would be different if executors or trustees were altogether evading the duty of administration and accounting even before the Courts in the country of the domicile and estate of the deceased; but there is no case of that kind justifying and requiring, it may be, a special remedy now before the Court. Seventh, a special argument founded on the terms of Article 19th of the Treaty of Union, which has been already quoted, was submitted by the pursuers. The case is, in my humble judgment, so clear on the other grounds already stated that on this point I shall only add that I think the argument maintained by the pursuers is sound, and that I concur in the opinion of my brother, Lord Mure. The proceeding of the Court of Chancery is certainly directly against the spirit of the clause of the Treaty, which provides, as already noticed that 'no cause in Scotland shall be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Courts in Westminster Hall, and that the said Courts or any other of the like nature after

the Union shall have no power to cognise or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same.' The defenders say that no 'cause,' within the meaning of the Treaty, is being cognosced by the Court of Chancery, because no litigated question, the subject of a cause had arisen in this country when the administration order was pronounced. It appears to me that this is too narrow a view of the terms of the provision. The term 'cause,' in the provision of the Treaty, includes, in my opinion, any question of legal right on which a dispute has arisen, although it may not actually be already the subject of an existing litigation in this country. If an administration suit, such as exists in the Court of Chancery, had been a known form of proceeding in this country, and had been instituted in the case of this trust before the proceedings in the Court of Chancery, it appears to me the words of the Treaty would have directly applied to the case, and that the Court of Chancery would in that case be attempting to take up and cognosce a cause in Scotland. The circumstance that the administration is happily carried on without such a judicial process or proceeding does not, in my opinion, make a difference in principle. The cause which the Court of Chancery seeks to cognosce is essentially a Scottish cause, or, in words of the Treaty 'a cause in Scotland,' and the order of the Court of Chancery is substantially, in effect 'to stop the execution' of the decree of confirmation of the Commissary of Dumbarton, which authorises the defenders to administer and dispose of the executry estate in this country, subject to their obligation to account to the Courts in Scotland for their acts and intromissions. With these observations, I concur in thinking that the decree proposed by your Lordship should now be pronounced."

The formal interlocutor of the Court was to the following effect :—

"Having heard counsel on the reclaiming note for the defenders against Lord Fraser's interlocutor, dated 15th December, 1883, the Court recalls said interlocutor,; finds, declares, and decerns in terms of the declaratory conclusions of the summons; sequestrates the whole estate and effects of the deceased John Orr Ewing, contained in an inventory given up by the defenders in the Court of Commissary of Dumbartonshire, and recorded in the books of that Court, 13th May, 1878; nominates and appoints George Auldjo Jamieson, chartered accountant in Edinburgh, to

be judicial factor of the said estate and effects, with power to take full possession of the said estate and effects, and to hold and administer the same until further orders of the Court, with all the usual power, after he finds caution; suspend for the present all action on the part of the defenders in administration and disposal of the estate; interdicts the defenders, until the said estate and effects are fully vested in and taken possession of by the said judicial factor, from removing the estate, or any part thereof, or any titles, writs, or securities of the said estate beyond the jurisdiction of this Court, and from delivering, paying, or accounting to any person or persons other than the said judicial factor; and decerns, reserving in the meantime all question of expenses."

What then is the effect of this judgment? The Judges have unanimously held that the estate falls to be administered in Scotland, and that the decision in the Court of Chancery, sustained by the House of Lords, does not rule in the question submitted to the Scotch Court. They hold that the Chancery decision is against Scotch law and international law. Further, the argument which was brushed aside by the Lord Chancellor, as to the effect of Scotch confirmation, has been interpreted to a totally different effect by the Judges of the country where the commissariot is situated. A judicial factor has been appointed and the trustees superseded. This appointment may be regarded in more than one aspect. It may imply that if it is proposed in the English Court to deal with the trustees, the Scotch Court has superseded them in order over them significantly to plant its protecting shield. But, besides, some person has to see to the collection of the revenue of the estate. In the position in which the trustees were placed it was impossible to do so without serious personal responsibility, and of that responsibility they are now relieved. I understand that already Mr. Auldjo Jamieson has demanded delivery of the papers connected with the estate from the trustees. How the trustees are to shake themselves free from responsibility is certainly a very difficult legal problem. I imagine that, having regard to the estate being one in the West of Scotland, the appointment of a judicial factor resident in

Glasgow would have been more generally approved; but perhaps, in the circumstances, the appointment of one resident near the Court has its advantages. The next stage of this extraordinary case will be regarded with unusual interest by Englishmen as well as Scotchmen.

NOTES ON THE CONFLICT BETWEEN ENGLISH AND SCOTCH JURISDICTION, AND THE REMEDY.

IN the preceding pages I have carefully abstained from argument. The conflicting views taken by the Judges are clearly enough set forth by themselves. There seems, however, no reason to doubt that the litigation will not be allowed to rest where it is. As the trustees were ordered by Mr. Justice Chitty to appeal the judgment of Lord Fraser to the Inner House, I believe it will follow, as a matter of course, that the trustees will be ordered to appeal the judgment of the First Division to the House of Lords. It is open, I think, to me to say (because this point, at least, is surely beyond dispute) that whatever be the decision in the House of Lords, should the judgment of the Court of Session be reversed, such reversal cannot be on the ground that the judgment of that Court is contrary to Scotch and International law. I am not aware that there are any international legal authorities to a contrary effect from the law as laid down by Lord Fraser and endorsed by the Lord President and the judgment of the First Division. I am content on this point simply to quote the following passage from Lord Fraser's judgment, and to refer to the authorities collected by him, and to the extract from his judgment which I gave in the history of the Orr Ewing case :—

"I am urged to dismiss this action because the House of Lords, the ultimate Court of Appeal from Courts in Scotland, have

upheld the order of the Court of Chancery, and that, therefore, as it is the same tribunal which must ultimately dispose of this case, it is idle now to pronounce a judgment in any sense contrary to what has been decided. This argument altogether overlooks what is the position of the House of Lords. It is, no doubt, the ultimate Court of Appeal appointed by the constitution of the country. It requires to administer the law according to the law of the country from which the appeal comes. In the case before it, of Orr Ewing, it had only to determine whether the Chancery Court had correctly decided as to the rule of Chancery practice. In the case that will now come before it—if this case be appealed to the House of Lords—it will have to determine, not any rule as to Chancery practice, but a question as to international law,—that is *quoad hoc*, the law of Scotland. The House of Lords cannot—or, at all events, ought not to consider, in reference to the question brought before them by an appeal from this judgment, any other point than this, whether, according to the law of nations, this rule of the Chancery Court of England must be respected by a foreign Court, when the people of that foreign country in recognising it, would be thereby subjected to grievous expense and many inconveniences; and when, moreover, the practice itself is contrary to all sound principles of international law.

"So far as I have been able to ascertain—and I have used endeavours to ascertain it—the practice of the Court of Chancery in this matter is without example in the Courts of any of the other European States; as it certainly is so in America even in those States of the Union where the English law is most closely followed. If the action of the Court of Chancery were sustained by the executive Government of this country, it might lead to embarrassing questions with foreign nations. A citizen of the French or American Republics whose domicile is in his own country may have investments in the British funds, and one of his executors—a Frenchman or American—may be resident in London. If the Court of Chancery, in an administration suit, committed that executor to prison for not bringing the whole assets of the deceased from France or America to be administered in London, it is not to be supposed that an act like this would be patiently submitted to by the foreign Governments whose subject was imprisoned. And it is not at all clear that, however settled may be the practice of the Court of Chancery, the executive Government of this kingdom would sustain it—contrary as it is

to the law of nations—at the hazard of disturbing peaceful relations with foreign powers. Nor can this practice of the Court of Chancery have been so very settled, seeing that so great a master of it as Lord Westbury, in the year 1862, expressed himself as follows: 'I hold it to be now put beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. . . . The utmost confusion must arise, if, where a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and next, of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium, and Russia, and if the course pursued by the Court of Probate and the Court of Chancery in the present case were followed by the Courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property. It is unnecessary to dwell upon the evils which would result from this conflict of jurisdiction; it was to prevent them that the law of the domicile was introduced and adopted by civilised nations. I am therefore of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a Court of construction and administration. They might have insisted that it was the duty of the Court to hand over to the executors the clear English personal estate, and to have remitted the next-of-kin to the Court of the domicile to the testator. But the Executors did not do so' (*Enohin* v. *Wylie*, 31 L. J. Chan. 405).

"The Lord Chancellor (Earl of Selborne), in the case of *Ewing and Others* v. *Orr Ewing*, dissents from this opinion; but, at all events, this much can be said for it—that it was the opinion of Lord Westbury. *And he stated an incontrovertible fact in saying that his opinion was in accordance with the views given effect to by the Courts of civilised nations, and upheld by the jurists recognised as authorities on international law.*"

If, then, the judgment of the Court of Session be reversed, it will be upon the ground that the House of Lords decided the Chancery case on appeal from the

Court of Chancery according to Chancery law, and that having once decided that the particular fund or estate was to be administered by the Court of Chancery, they cannot at a subsequent date annul the decision at which they previously arrived. In either event, the result will be anomalous, because the House of Lords must either decide that the Court of Session has power to prohibit the administration of an estate in England which the House of Lords had previously ordered to be done, or they must determine that although Scotch law and international law are both to the effect that the estate in Scotland must be administered in Scotland, still, in consequence of a Chancery decision they must overrule both Scotch and international law. In either case, the necessity of legislation becomes evident. It would amount, of course, to a deadlock that there were orders on the part of both Courts with reference to the administration of the whole estate in their respective countries, and it would be an outrage on Scotland that an estate which is admittedly a Scotch estate, and to the extent of $\frac{17}{18}$ths was situated in Scotland at the date of the death of the testator, a domiciled Scotchman, should be dragged away to be administered in England in the teeth of what is admittedly Scotch and international law. In the former case, the Legislature itself might be relied on with tolerable certainty to put an end to the absurdity, and in the latter case I venture to hope that the indignation of Scotland would not rest until the anomaly of the administration of Scotch estates in England was once and for ever put an end to.

Previous to the year 1875, although there had been cases (such, for instance, as the great case where the Marquis of Bute's guardianship was involved) where Scotchmen were disposed to think that there was an encroachment by the English Courts with reference to duties and powers which should more properly have been administered by the Courts of Scotland, still probably no extensive hardship was felt in the matter by Scotland. In the able memorial "regarding the assumed jurisdiction of the English Courts over Scotchmen," signed by

Messrs. Andrew Jameson and G. W. Burnet, advocates,* it is stated, I think with truth: "Be this as it may, it is certain that very little real hardship was caused by the exercise of the Chancery jurisdiction alluded to, except in a comparatively limited number of cases in which, at the instance of some hostile or interested party, the Court of Chancery thought fit to assume the administration of the estates of deceased Scotchmen in respect that such estates consisted, to some extent, of funds invested in English stocks, or in respect that a minor having a beneficial interest in the estate happened to be temporarily resident in England, possibly for educational purposes." These words were penned before the Orr Ewing case—which I regard as the culminating case falling under the category of cases above noted—had come on the *tapis*. But the Bute case, the Stirling-Maxwell case, and the Orr Ewing case, are all cases of the description enumerated above. I think that the Orr Ewing case has so accentuated the national feeling on the subject that, limited as the number of such Chancery cases is, the Chancery Courts are regarded in Scotland as having deliberately trampled on its independence.

But there is another class of cases, with regard to which there is, and for years has been, a great amount of public feeling, namely, the cases in which the Judges in England have assumed jurisdiction over Scotchmen in virtue of the *assumed* powers of the English Judicature Act of 1875. It may be well to understand distinctly under what precise authority this jurisdiction

* This Memorial was submitted on behalf of the following bodies:—The Faculty of Advocates; the Society of Writers to the Signet; the Society of Solicitors before the Supreme Courts; the Society of Solicitors-at-Law, Edinburgh; the Society of Advocates of Aberdeen; the Faculty of Procurators of Dundee; the Faculty of Procurators in Glasgow; the Faculty of Procurators in Greenock; the Faculty of Procurators in Paisley; the Society of Solicitors of Perthshire; the Ayr Faculty of Solicitors; the Society of Solicitors and Procurators of the Eastern District of Fife; the Faculty of Procurators of Dumfriesshire; the Society of Solicitors of Elginshire; the Faculty of Solicitors of Inverness-shire; The Society of Solicitors and Procurators of Stirling.

has been claimed. I do not suppose it is asserted that the English Courts previously to the year 1875 had the jurisdiction at common law which they have from time to time since that date exercised against domiciled Scotchmen. It is very certain that if they had that jurisdiction previously it was not exercised in a way that was felt as oppressive. If, as I assert, there was no such jurisdiction previous to 1875, as that which has been assumed then, as pithily pointed out in a memorandum prepared "by the Committee* on Bills of the Faculty of Procurators in Glasgow respecting serving of writs from the Supreme Courts of England and Ireland, and its effect in Scotland," "*to assume jurisdiction in causes which, previous to the rules in question, must have been tried in Scotland, is to contravene the Treaty,*"—*i.e.*, the Treaty of Union. In the history of the Orr Ewing case I incidentally referred to the 19th Article, which, however, may be quoted here: "No causes in Scotland shall be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall, and the said Courts, or any other of a like nature after the Union, shall have no power to cognosce, review, or alter the acts or sentences of adjudicature within Scotland, or stop the execution of the same."

With reference, however, to this view, it might possibly be open to an English legal cynic to say: "Be it so; but is there anything to prevent the Imperial Parliament abrogating any provision of the Treaty of Union?" I think there might be a great deal to state against such an argument, but I do not propose to discuss that subject here, beyond saying that I think it will be universally admitted that it would have been a piece of miserable chicanery on the part of the framers of the English Judicature Act, if their intention was to confer on English Judges a jurisdiction against domiciled Scotchmen, not previously possessed by the former, to attempt to do so by a side wind, the proposal to confer such jurisdiction

* I believe this very able report, which intrinsically shows a large amount of scientific jurisprudence and research, was drafted by Mr. T. C. Young, Jun.

by express enactment having been more than once defeated previously; and, further, that if such was not the intention of the framers, that English Judges had no right to take advantage of the mistake. But I go a good deal farther than this, and assert as matter of law—

I. That it was impossible, except by express enactment, to confer any jurisdiction on the English Judges as against domiciled Scotchmen which was not previously possessed by the English Courts.

II. That such jurisdiction was not conferred by express enactment, and was not previously possessed at common law.

These points I will take up and deal with in their order.

1. The English Judicature Act of 1875 was not supposed to touch matters Scotch or Irish; and I think, therefore, there was reasonable excuse on the part of the Lord Advocate of the day, and the Scotch Members, in not perceiving the possible risk to Scotch independence involved. Indeed, if my view of the law be correct, the then Lord Advocate would be entitled to assume that there could be no risk of the kind referred to, inasmuch as there was no clause in the Act expressly conferring jurisdiction. I take the following account of the previous proposals with reference to giving the English Courts power to permit service abroad, and the way in which the Judicature Act was passed without objection from Scotch Members from the memorial signed by Messrs. Jameson & Burnet, previously referred to, and which, I believe, accurately describes how that matter escaped the notice of the Lord Advocate and the Scotch members.

"In 1852, when the Bill which afterwards passed into the Common Law Procedure Act of 1852 was introduced, it contained a clause permitting service abroad. The question was raised as to the effect of this upon Scotland and Ireland, and in the course of the passage of the Bill through Parliament the clause was amended to the effect of exempting Scotland and Ireland from its operation. In 1854 another attempt was made to draw Scotsmen within the jurisdiction of the English Courts by the provisions of an Act of Parliament, but it was defeated.

"The successful resistance of these attempts to extend the jurisdiction of the English Courts over domiciled Scotsmen was evidently, in 1873, still in the recollection of the promoters in Parliament of the Supreme Court of Judicature Act passed in that year, for no attempt of the kind was made during the passage through Parliament of that Statute; but in the early part of the Parliamentary session of 1875 a Bill was introduced to repeal the clause of the Act of 1852 which exempted Scotland from the operation of that Act. This Bill was read a second time, and was even passed through Committee without remark, but thereafter the attention of the Lord Advocate for Scotland and the Solicitor-General for Ireland was called to this Bill by the Convention of Scottish Royal Burghs, with the result that it was thrown out. As already stated, however, the object which that Bill had in view was attained in the same Parliamentary session by the passing of the Judicature Act, and the enactment under it of the rule already quoted. The said rule was contained in a schedule annexed to the Act, which was entitled 'Rules of Court,' and being there, it escaped the notice of Scotch Members of Parliament, who naturally supposed that they had no concern with the rules of the English Courts. In this way the legislative settlement of 1852, which had virtually been approved of by Parliament in 1854, 1873, and 1875, was overset without Parliamentary discussion, and the jurisdiction of the English Courts was extended over domiciled Scotsmen without their representatives having an opportunity of being heard in Parliament upon the question."

However, that Act, with certain rules of Court in the schedule, passed; and since that date, certain orders purporting to be issued under its authority have been issued by the Judges. These will fall to be given *in extenso* under the next head, under which I will show that there is nothing in the Act itself which can be construed as expressly conferring a jurisdiction on the English Judges which was not possessed at the time of the passing of the Act. If this is so, what then? Why, the power on the part of the English Judges to issue orders under the Act is necessarily confined to issuing orders in connection with suits brought before them against those subject to their jurisdiction at the time of the passing of the Act.

They are not entitled at their own hands, under this Act, to make orders which will subject Frenchmen, Germans, or other foreigners to their jurisdiction; and I take it, if there is anything clear in the law of Scotland at all (Sir George Jessel notwithstanding), it is that Scotchmen, so far as the law of England is concerned, are foreigners. As will be afterwards pointed out, it is only because of the Judgments Extension Acts that the assumed jurisdiction is of any practical value; and these Acts were, I need hardly say, passed without any reference to questions of jurisdiction in connection with the Courts of first instance. I mean, it was assumed in the passing of these Acts that they would merely make more effectual the decrees of English and Scotch Courts with reference to existing practice and jurisdiction. I do not suppose it can be disputed that, albeit under the Act referred to the English Judges are intrusted with the power of making orders, it would have been manifestly *ultra vires* if they had made a general order that all Scotchmen might be summoned to any English Common-Law Court on an affidavit that it would be a hardship to the English plaintiff to pursue in Scotland. If this is not open to dispute, what then? Does it not follow that it is also *ultra vires*, if the English Judges had no jurisdiction at the time of the passing of the Act against a domiciled Scotchman, for them to confer it upon themselves by their own orders? Their orders can only be applicable to those against whom they have jurisdiction. This I take to be sound apart altogether from the Treaty of Union, and apart from the Common Law Procedure Act of 1852. But there is an express enactment unrepealed—one of the most solemn and important Acts ever passed—that no causes in Scotland shall be cognosced by the English Courts, surely *à fortiori* it may with confidence be asserted that, except by words of express enactment, it was impossible to confer on English Judges a jurisdiction not previously possessed to institute action against a domiciled Scotchman. Then, again, I may refer to the argument of Mr. Charles Russell, Q.C., for the defendant in the case of

Nottage v. *Finlay*, and reported in the *Times* of 25th and 30th November, 1881, which was to the effect that, as the Common Law Procedure Act, by which it is incompetent to serve a writ in Scotland, still remains unrepealed, the order of the English Judges under the Judicature Act could not *per se* make it competent. The case was, I believe, extra-judicially settled, and the point argued remained undecided.

I. My next proposition divides itself under two heads.

1. That no new jurisdiction on the English Judges was conferred by the Judicature Act of 1875 by express enactment as against Scotchmen.

2. That, prior to the Judicature Act of 1875, no jurisdiction was possessed by the English Judges at common law, or otherwise, against Scotchmen, such as has been assumed since the passing of the Act in question.

Before dealing with these two points in their order, it is well that I should make it distinct that, as matter of law, domiciled Scotchmen can be regarded by the English law in no other light than that of foreigners. This, indeed, was pointed out in the earlier pages of this pamphlet in the quotation which I gave from Lord Fraser's judgment.* In the passage of Lord Fraser's judgment referred to, it will be observed he points out that the Judgments Extension Act cannot be held in any way to affect the question of Scotland being still as regards England, so far as the administration of the law is concerned, a foreign country. And a distinct passage of the Lord President's opinion (*See* p. 31) also makes this clear.† But let us take the opinion of English Judges on this subject. So recently as the year 1861, in the great Bute case, the Lord Chancellor (Campbell) began his judgment with the following passage :—

"I think that this case mainly depends upon the propriety or impropriety of the interlocutor of the Second Division, dated 20th

* *Vide* p. 18.

† A considerable portion of the above was in type before the judgment of the First Division.

July, 1860, refusing then to interfere respecting the custody of the person of the infant Marquis of Bute, and adjourning the further consideration of the subject for four months, until the 20th November following. In examining this question, I beg to begin by observing, that as to judicial jurisdiction Scotland and England, although politically under the same crown, and under the supreme sway of one united Legislature, are to be considered as foreign countries unconnected with each other. The case is of a judicial nature, although not between parties who are plaintiffs and defendants, and it is to be treated as if it had occurred in the reign of Queen Elizabeth."

In this judgment, Lords Wensleydale, Cranworth, Chelmsford, and Kingsdown concurred, and this statement of the Lord Chancellor was unchallenged by any of the noble and learned lords. That this, therefore, is the true state of the law does not appear to admit of doubt, and my only reason for referring to the matter, even at this length, is in consequence of the passage previously quoted from the judgment of the Master of the Rolls, in which he denied that Scotland was to be regarded as a foreign country.

1. Was any change as to jurisdiction effected by the Judicature Act? By section 17 of that Act it was provided—

"Her Majesty may at any time after the passing and before the commencement of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor and the Lord Chief-Justice of England, the Master of the Rolls, the Lord Chief-Justice of Common Pleas, the Lord Chief-Baron of the Exchequer, and the Lords-Justices of Appeal in Chancery, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by the principal Act as amended by this Act, or of a majority of such other Judges, make any further or additional Rules of Court for carrying the principal Act and this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the rules in the first schedule to this Act; that is to say,

(1.) For regulating the sitting of the High Court of Justice, &c.;

(2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and,

(3.) Generally for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof and of the Supreme Courts, or of the costs of proceedings therein.

"From and after the commencement of this Act, the Supreme Court may at any time, and with the concurrence of a majority of the Judges thereof present, at any meeting for that purpose held (of which majority the Lord Chancellor will be one), alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making Rules of Court as is by this section vested in Her Majesty in Council on the recommendation of the said Judges before the commencement of this Act.

"All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within such time and be subject to be annulled in such manner as is in this Act provided."

Turning now to section 25, we find the time and the manner prescribed. Section 25 provides that :—

"Every Order in Council and Rule of Court required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or, if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament, within the next subsequent forty days on which the said House shall have sat, praying that any such Rule or Order may be annulled, Her Majesty may thereupon by Order in Council annul the same; and the Rule or Order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same."

By section 16 it was enacted—

"The Rules of Court in the first schedule to this Act shall come into operation at the commencement of this Act, and, as to all matters to which they extend, shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such Rules of Court, and also all such other Rules of Court (if any) as may be made after the passing and before the com-

mencement of this Act under the authority of the next section may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act."

Order xi., Rule 1, of the Rules of Court appended to the first Schedule of the Act, ran as follows :—

"Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a Judge whenever the whole or any part of the subject matter of the action is land, or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damage or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction."

Order xi., Rule 3, is in the following terms :—

"Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made."

Now, it will be observed that Order xi. has reference simply to the service of summons, or notice of summons, being made or given outwith the jurisdiction. There is no distinction as regards Scotland in the Order, except so far as may be argued from the reference to a British subject, which, of course, is a very wide phrase indeed. The Act itself, it will be observed, by the 16th clause quoted above, merely enacts "that the Orders of Court shall regulate the proceedings of the High Court of Justice." The mere enactment that the proceedings shall be regulated by certain Rules of Court cannot, I submit, confer a new jurisdiction. No doubt these Rules of Court, in certain classes of enumerated cases,

authorise the English Judges to permit notice of an action to be given to persons outwith the jurisdiction, but the permission to give notice to persons outwith the jurisdiction does not make such person amenable to the jurisdiction if no jurisdiction be possessed at the date such notice was given. I propose to show later on that in the class of cases enumerated in Order xi., Rule 1, quoted above, by Scotch if not by international law, service within the jurisdiction was requisite to found jurisdiction, and that the Scotch law in a question of jurisdiction must rule. If it had been intended by the framers of the Act to make service outwith the jurisdiction equivalent to service within the jurisdiction, so far as regards Scotland, it ought to have been expressly enacted. This, however, of course could not have been done in Order xi. without the express mention of Scotland, that Order applying generally to service on all foreigners outwith the jurisdiction; but I submit that this not having been done, no jurisdiction was conferred against Scotchmen which was not previously possessed.

2. Had, then, the English Judges jurisdiction at common law in the class of cases enumerated in Order xi., Rule 1, as against Scotchmen? For the purpose of argument I am content to admit that they had such jurisdiction if there was personal service within the jurisdiction. Let us first glance at the law of foreign nations. It is true that by the French Code, article 14, the right is accorded to a Frenchman to bring a foreigner before the French Tribunal though not resident in France, for the execution of obligations contracted by him towards a Frenchman, whether such obligations were made in France or elsewhere. But the following is the comment of the celebrated French lawyer, M. Fœlix, on that subject:—

"Fœlix, *Traité du Droit International Privé*, Book 2, Title 2, chapter 2, section 3, paragraph 169: 'Mais l'art; 14 du Code civil renferme une autre exception, qui se rapporte specialement aux étrangers: c'est le droit accordé aux Français d'assigner un étranger, même non residant en France, devant les tribunaux Français, pour l'execution des obligations par lui contractées envers un Français, soit en France, soit en pays étranger. Cette

exception à la règle *actor sequitur forum rei* se trouve établie en France dans des termes beaucoup plus généraux qu'elle ne l'est dans les autres pays de l'Europe : dans ceux-ci, ainsi que nous l'indiquerons *infrà*, No. 188, ou a limité l'exception à quelques cas spéciaux où les circonstances semblent la motiver, et elle a lieu en faveur des étrangers comme des regnicoles ; en France, aux contraires, l'exception est générale et en faveur des regnicoles seuls. Aussi, dans la plupart des pays étrangers la disposition de l'art 14 est regardée comme étant contraire au droit des gens, et dans divers pays on a pris des mesures de rétorsion au préjudice des Français, ainsi que nous l'expliquerons au même No. 188. 170 L'ancienne jurisprudence française n'avait pas adopté le principe consacré par l'art. 14.'"

On the same point reference also may be made to Westlake's "Private International Law," p. 203 :—

"It is very common for the Courts of a country to entertain actions, under circumstances in which they would not admit that the jurisdiction was sufficiently founded to entitle the judgment of a foreign Court, pronounced under similar circumstances, to be recognised as internationally binding. For example, the personal forum of the plaintiff, introduced by Article 14 of the Code Napoléon, and copied in other countries whose legislation is based on that Code, is not even in France considered to possess any international validity, and no authority is allowed there to a judgment pronounced in one of those countries on the ground of it. *Hence the true question for private international law in the matter of jurisdiction is not what actions are entertained by the Courts of a given country, but in what cases those Courts will recognise foreign judgments.*"

Again, in Dr. Bar's "International Law, Private and Criminal," Gillespie's Translation, the following passages may be cited, p. 521, section 120 :—

"On the other hand, the *forum contractus* seems to embrace a far wider sphere in the common law than that which our reasoning would assign to it. According to the older view, this jurisdiction is established at the place where the contract was concluded, provided that the debtor is personally present there ; but by a more modern view, it exists in the place where the obligation is, either by implication or by express agreement of parties to be performed, and it does so, as many authorities think, even without requiring

the personal presence of the debtor there, or the possession of any property by him. . . . Let us now consider the question (p. 529) whether, by the law of the present day, the *forum contractus* requires the personal presence of the defender, or the possession of some property by him."

The conclusion which he arrives at is that in the general case these conditions are necessary, but (p. 531) :—

"These conditions are no longer required in the case of obligations *ex delicto*, and any measure to protect the injured party seems justifiable."

Practically, therefore, Bar's exposition of the law as to jurisdiction in this matter recognises certain exceptions to the general rule, that in order to found jurisdiction against a foreigner there must be personal presence on the part of the defender or estate situated within the jurisdiction. Savigny (Guthrie's Translation), p. 220, says:—

"The jurisdiction of the obligation can be made effective only if the debtor is *either* present in its territory, or possesses property there ; in which last case the decree against him will be enforced by *missio in possessionem*. By the older Roman law this alternative condition is unquestionable. By the terms of a law of Justinian we might regard it as abolished. But this law is expressed so generally and indefinitely, and mixes up the various changes so indiscriminately, that the intention to change the former law cannot with any certainty be inferred. Hence, too, a decretal has paid no regard to it, but adheres to the older Roman law, even to the very phrases. The preponderance of modern practice has followed this opinion, so that the jurisdiction of the obligation cannot be made effectual against an absent person by the mere requisition of a foreign Court. It is not to be denied that by this restrictive condition the forum of the obligation loses a great deal of its importance."

In Scotland the law is exactly as stated above by Savigny. (See note to the above passage by Sheriff Guthrie, and cases there referred to.) As illustrative of the law of England, I take the following quotation from the memorandum prepared by the Committee of the Glasgow Faculty of Procurators, and previously referred to :—

"1. The general rule is that in personal actions the pursuer

follows the domicile of the defender. *Actor sequitur forum rei.* —Guthrie's Savigny, 2nd Ed., pp. 125, 126.

"The Roman law allowed also an action to be brought in the place of the fulfilment of the contract, provided the debtor was either present there, or possessed property there. This is the rule in Scotland—Guthrie's Savigny, p. 120, Note 3, 2nd Ed., and cases there quoted.

"In England, until the passing of the Common Law Procedure Act, 1852, the rule of the Common Law was that personal service within the realm (England) was necessary.—Foote on Private International Jurisprudence, p. 250 *et seq.*

"In Chancery, the Judges had a discretionary power to order service of a bill on the defendant without the jurisdiction. This power they only exercised in accordance with the principles of International Law—*e.g.*, in cases where the subject matter in dispute was within the jurisdiction. Thus in *Hart* v. *Herwig*, L. R., 8 Ch. 860, James L. J. says, with regard to the general question, 'I am of opinion, that according to the established Law of Nations, if this suit were a suit of damages only, or one which could result in damages only, then the plaintiff must, in order to enforce his claim for damages, go and seek the forum of the defendant. But where the contract, as in this case, though made abroad, is to deliver a thing *in specie* to a person in this country, and the thing itself is brought here, then the Court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered. *All the cases cited go upon the same principle, and they show that you cannot sue a foreigner in this country, unless the parties are resident here or the property is situate in this country.*'

"The Common Law Procedure Act, 1852, §§ 18 and 19, for the first time permitted service abroad (*except in Scotland or Ireland*), where the cause of action or a breach of contract arose within the jurisdiction. So the law stood until the rules in question were passed.

"The English Courts seem not to exercise reciprocity in this matter. Thus, in the case of *Schilsby* v. *Westenholz*, L. R. 6, Q.B. 155, it was held that a judgment of a Foreign Court, obtained in default of appearance, against a defendant, cannot be enforced in an English Court where the defendant, at the time the suit commenced, was not a subject of or resident in the country in which the judgment was obtained; for there existed nothing imposing any duty

on the defendant to obey the judgment of the Foreign Court. 'On this point,' said Blackburn J., delivering the opinion of the Court of Queen's Bench, 'We think some things are quite clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time when the suit was commenced, resident in that country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owning temporary allegiance to that country, we think that its laws would have bound them. If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we would be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued; but every one of these suppositions is negatived in the present case. Again, we think it clear upon principle that if a person selected as plaintiff the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.' Here the *locus solutionis* of the contract was in France, but that *per se* was held not a sufficient ground of jurisdiction, although it would have been under the English rule."

The following passage, however, from Foote, shows that prior to the passing of the Judicature Act, although there are conflicting decisions on the point, the English Judges were inclined to take the view that service within the jurisdiction on a foreigner was not in all cases necessary for an action founded on breach of a contract made, or the performance of which was contemplated, within the jurisdiction, or in connection with a cause of action arising within the jurisdiction. Foote, page 250, says :—

"At common law, personal service within the realm was necessary until 1852. The Common Law Procedure Act of that year permitted service abroad (except in Scotland or Ireland) in actions against both British subjects (sect. 18), and foreigners (sect. 19), when there was a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; and the Court, or a Judge, on being satisfied by affidavit of these facts, and that reasonable efforts were made to

effect service of the writ, which had come to the defendant's knowledge, were empowered to dispense with service altogether. It will be seen that the limitation confining this statutory power to cases in which there was a cause of action which arose within the jurisdiction, *or* in respect of a breach of contract made within the jurisdiction, may be construed in two ways: first, as confining the statutory power in respect of actions on contract to cases where the contract was made within the jurisdiction; and secondly, as including cases where the contract was made abroad, but the breach took place in England—this second construction regarding the *breach* of a contract as a 'cause of action' within the meaning of the first part of the limitation. Upon this question the Courts at Westminster at first held divided views; the Queen's Bench adhering to the view that it was insufficient that the breach of a contract should take place within the jurisdiction, if the contract itself was made abroad, while the Courts of Common Pleas and Exchequer acted upon the opposite construction. In consequence of these conflicting views, a conference of the Judges was ultimately held upon the subject, and the view taken by the Court of Common Pleas in *Jackson* v. *Spittall* was accepted as binding once for all; so that according to this, the latest authority, a plaintiff was entitled, under the Common Law Procedure Act, 1852, to serve the defendant abroad, if he could show that the contract was either made or broken within the jurisdiction."

Therefore, apparently, prior to 1875, English Judges had assumed they had jurisdiction with regard to foreigners when the contract was either made or broken within the jurisdiction, and this in consequence of the Common Law Procedure Act provision of service abroad. Scotland and Ireland were expressly exempted from this provision, and therefore, admittedly, there was no jurisdiction against either Scotchmen or Irishmen in such cases. The provisions as to service of writs outwith the jurisdiction are contained in the 18th and 19th sections respectively of that Act. At the passing, then, of the Act of 1875, whatever may have been the theory entertained by English Judges as to jurisdiction in cases of alleged breach of contract by foreigners (if the place where the contract was made, or the place where it was to be performed was England), without service on the defender within England, undeniably the

authority of international lawyers was, generally speaking, against the competency of such jurisdiction; and unquestionably there was no jurisdiction by the law of Scotland.

If I am right in the contention advanced, that no new jurisdiction was conferred upon the English Courts, are the Courts of Scotland bound, in consequence of the Judgments Extension Act of 1868, to recognise a jurisdiction which they repudiate? That, I think, is a question which might be raised in the form of an interdict against the issuing of a certificate under the Judgments Extension Act by the Registrar appointed under that statute. To excerpt from the passage of Westlake quoted above, it must be remembered "the true question for private international law in the matter of jurisdiction is not what actions are entertained by the Courts of a given country, but in what cases those Courts will recognise foreign judgments." The following quotation may also be made from Foote :—

"The ordinary mode adopted in England of enforcing a foreign judgment being then to bring an action upon it, as creating a substantive legal obligation, it becomes important to consider what objections may be taken to its validity. Anything which negatives the existence of that legal obligation or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the Court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, *or because he, the defendant, was not subject to that jurisdiction. That the foreign Court should have had jurisdiction in the first instance is the essential condition implied by Parke, B., in his enunciation of the principle on which foreign judgments are recognised here, cited above; and, indeed, hardly stands in need of authority to confirm it.* But it is clearly not sufficient, in order to impeach a foreign judgment, to show that the Court which pronounced it had no jurisdiction by its own rules, if it had jurisdiction according to the principles of international law over the person of the defendant and the subject matter of the action. Thus a plea to an action on a judgment of the French Tribunal of Commerce, that the Court was not a Court

of competent jurisdiction in that behalf, according to the French law, because the defendant was not a trader, and was not resident in a particular town when the cause of action arose, was held bad. It is obvious that these defences, being admittedly defences by the French law, should have been pleaded in the French Court, and it is well established that defences which might have been raised in the Court where the judgment was obtained, cannot be brought forward afterwards to impeach it. The rule that the person of the defendant must be properly subject to the jurisdiction has been put by modern cases in the clearest possible light."

When the Judgments Extension Act was passed in 1868, it was passed on the footing that no judgments could be pronounced against domiciled Scotchmen for breaches of contract, &c., unless there was personal service within the English jurisdiction, and, as I said at the outset of the remarks with reference to the above subject, I fail to see how, without a new jurisdiction being expressly conferred, the old immunity of Scotchmen from such jurisdiction can be held to be done away with. It might be contended, What is the object of service outwith the jurisdiction if it be not to confer jurisdiction as against the person so served? Might the answer to that not be, It might confer a limited jurisdiction, permitting that Court who had sustained the jurisdiction and pronounced decree on that assumption, the power of attaching under such decree any funds or estate subsequently coming into the jurisdiction, but it could confer no further jurisdiction.

The Judgments Extension Act is, I submit, a mere executorial Act. No doubt the expressed object is to render decrees obtained in England, Scotland, and Ireland effectual in "any other part of the United Kingdom." This Act was, as I have pointed out, passed seven years before the Judicature Act, and I contend did not contemplate, and could not confer without express enactment, a different jurisdiction than that in force at the time of its passing. At all events, this could not be conferred in the Judicature Act except by the express repeal of the previously quoted section of the Act of Union, and the provision in the Common Law Procedure Act expressly

exempting Scotland from the power conferred therein on the English Acts to order service of writs outwith the jurisdiction. In connection with this point, reference may be made to an extract from the memorial signed by Messrs. Jameson and Burnet:—

"It is indeed a grave question whether the enactment of these Rules and the practice of the English Courts under them are not so utterly illegal and unconstitutional as to entitle the Scotch Courts and Scotch officers of the law to refuse to recognise any proceedings under them. The Scotch Courts undoubtedly would have been appealed to, to suspend decrees in absence obtained in actions proceeding in the English Courts upon service out of the jurisdiction, but for the fact that owing to judicial dicta in the case of *Wotherspoon* v. *Conolly*, 10th February, 1871 (Session Cases, Third Series, vol. ix. p. 510), Scottish lawyers have been deterred from advising their clients to raise questions of jurisdiction by way of suspension, because in that case the Judges in the First Division of the Court of Session seemed to consider that they were precluded by statute from entertaining objections to judgments registered in terms of the Judgments Extension Act, 1868."

With reference, however, to the dicta referred to, it may be pointed out that the action was one of suspension of the certificate issued by the Registrar under the Act, and there is a clause in the Act making the extract of the certificate equivalent to a Court of Session decree. "All proceedings shall and may be had and taken on the extract of such certificate, as if the judgment of which it is a certificate had been a decreet originally pronounced in the Court of Session at the date of such registration." I submit that the better plan would have been to have attempted to interdict the issue of the extract. But the following quotation from the Lord President's opinion distinctly shows that if the Court had come to the opinion that there was deliberate straining of jurisdiction as against Scotland the Court would interfere, and I submit that, subsequent to 1878, it has been very manifest that the English Courts have deliberately strained their jurisdiction against Scotchmen:—

"The only other allegation requiring to be noticed is, that the Court in Dublin had no jurisdiction over the complainers, because they are domiciled in Scotland. Now, I am not prepared to say that it is impossible to raise a question of jurisdiction in this form, of such a kind as that this Court might interfere. It is not very likely to occur, because none of the Courts of the United Kingdom are in the habit of straining their jurisdiction beyond what is right; but if it were manifest that another Court had gone beyond its jurisdiction, I am not prepared to say that there could be no remedy, whether in this or some other form. But there is no such case here. This is an attempt to raise a question of jurisdiction by no means of a clear nature, and, if the complainer's contention were correct, the result would be that when any such question arises in one of the three countries, the Courts of that part of the United Kingdom are to sit in review on the judgments of the Courts of another part of the Kingdom." *

This case, it may be noticed, was an Irish case. In 1876 there was very considerable agitation in Scotland against the effect, or supposed effect, of the English Judicature Act, and how the Scotch authorities should have permitted the passing of the Irish Act, without deliberate and persistent challenge, I cannot understand.

In connection generally with the subject I have been discussing, I quote here an interesting passage from a very able letter which appeared in the *Glasgow Herald* of 2nd February, on the Assumed Jurisdiction of the English Judges, written by Mr. T. C. Hedderwick, an English barrister, but also a Scotchman, whose patriotism, however, I am glad to say, has not been affected by his legal training:—

"The gist of all this is that power is given to a majority of Her Majesty's Judges, the very members of which majority for the time being may be, with the single exception of the Lord Chancellor, unknown not only to the public but even to the legal profession, to make rules of Court which acquire the force of an Act of Parliament when they have lain for forty days on the tables of the Houses of Parliament. This, I venture to think, is a novel and a questionable enactment. Assume for a moment that a majority of Her Majesty's Judges contemplate, either consciously or unconsciously, some breach of the power thus committed to

* See also Lord President, *antea*, pp. 32, 33.

them, the making of a rule which is *ultra vires*, or of a rule open to strong objection, what are the difficulties in the way of redress? In the first place, no one knows of what Judges the majority may be composed, or what innovations they may be projecting. The Judges who issued the new Rules of Court sat upon them for three years, and yet it is doubtful whether a single member of the bar could have named with certainty the Judges who were engaged upon the task.

"In the next place, Rules of Court, being dry and technical, are from their nature unlikely to attract any attention when they are tabled, except from English lawyers who happen to be members of the House of Commons. It is, besides, far from improbable that they may not be published so as to reach the hands of the profession generally until it is too late to oppose their operation.

"In the third place, even if some flaw in a rule should be discovered in time, the only mode in which redress can be had, unless the Judges should of themselves make a new rule abrogating the old, is by an address to Her Majesty, by either House of Parliament, praying that the rule should be annulled. It is obvious that such a mode of redress in such a matter is practically prohibitive. Is this extraordinary power, which may be described as a legislative function of which Parliament has divested itself in favour of Her Majesty's Judges, altogether free from liability to abuse? It may be said that the power so bestowed is limited to the regulation of procedure, and that the Judges are the persons best qualified to deal with such a matter. As far as capacity is concerned, no one, I daresay, will care to dispute the title of Her Majesty's Judges; and if the limitations prescribed by the Act had been adhered to in the past, and were certain always to be adhered to in the future, there would be no ground for complaint on the part of any one. But it is precisely here that objection will lie. It might be shown, as it was shown, if my memory serves me, by Sir Hardinge Giffard, that it was at least open to question whether the Judges had not, in the new rules, overstepped in some points the limitations imposed upon them by the Act. In answer to this, it may be objected that if the Judges transcend their authority, their rules are *ultra vires* and may be resisted. Yes, but by whom and at whose expense; or why should any individual suitor have the burthen cast upon him of disputing the validity of a rule made by the Judges before whom he must appear in disputing it. But is it possible that Judges of the Supreme Court could make such a mistake? I think it is not only possible, but that it has

actually occurred, and in saying so it is as well to bear in mind that the rules which bear the signatures of the Judges are frequently drawn by less exalted persons."

In the next place, I venture to lay down a proposition which I am satisfied admits of no dispute. *This assumed jurisdiction has caused great and unfair hardship to Scotchmen.*

Let us understand the history of the Rules of Court (so far as affecting the subject under discussion) issued under the authority of the Judicature Act of 1875. When the Judicature Act of 1873 was passed, it was left to the English Judges to frame the Rules of Court in connection with that Act, and the Rules of Court, as appearing in the 1875 Act, are the Rules which were framed in virtue of the provision of the 1873 Act. Between 1873 and the date when the 1875 Act came into force, there was no attempt to enforce a new jurisdiction as against domiciled Scotchmen ; but the theory on which the English Judges have proceeded is that in virtue of the 16th clause of the Judicature Act, in connection with the schedule appended, the Rules of Court set forth therein obtained the force of Imperial sanction to the effect of conferring on the English Courts the jurisdiction which has been so aggressively used.

Early in the year 1876, a bill was brought in by three Irish members to provide that the provision of the Rules of Court, previously quoted, should not extend to Scotland or Ireland. Here I may at once say that Irish members have ceased to agitate, along with Scotchmen, in the matter, because like powers were conferred on the Irish Courts by the Irish Judicature Act of 1877 as had been conferred on the English Judges by the Judicature Act of 1875. At the period when the bill referred to was brought in, the provisions of the Act, as interpreted by the English tribunals, had been felt to be oppressive by the commercial communities of both Scotland and Ireland. There was considerable agitation in connection with this Bill, and among other steps taken to bring the matter under the notice of influential legislators, a deputation waited upon Earl Cairns, then Lord

Chancellor. In the course of his reply to the deputation, the Lord Chancellor said :—

"If any person came before a Judge in this country, saying, 'I want to bring an action for a bill of exchange for £30, and the person is living in Cork, and I want him to come over to London, the Judge ought to say, 'This is not one of the cases intended to be allowed, and I shall not allow it.' This is really not a matter so much of principle as degree, and I do not think the way to remedy it is by an Act of Parliament. I think it is by an alteration of the rule, if the rule is too wide at present, and if it is not sufficiently guarded and checked."

As regards Scotland, the question is essentially one of principle. If I am wrong in the assumption of law that no new jurisdiction was conferred, it still unquestionably is the fact that the legislation which conferred the jurisdiction complained of was not direct legislation which challenged the opinions of the Scotch public on the subject, but was in defiance of the Treaty of Union, the effect of a schedule appended to an English Act, to which the attention of Scotch public officials was either purposely or unintentionally never directed. The result, however, of the subject being brought under the notice of the Lord Chancellor was the issue of certain further Rules of Court, which were supposed to be safeguards against the abuse of the assumed jurisdiction in question. Accordingly, the following riders were appended to Order liv. Rule 2 (Rule 2*a*), and to Order xi. Rule 1 (Rule 1*a*) :—

"The authority and jurisdiction of the District Registrar, or of a Master of the Queen's Bench, Common Pleas, and Exchequer Divisions, shall not extend to granting leave for service out of the jurisdiction of a writ of summons, or of notice of a writ of summons."

This made it necessary for a Judge himself, and no longer a Master of the Court, to issue writs outwith the jurisdiction.

"Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof

damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract, wherever made, the Judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of his jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown."

In practice it was found that Rule 1*a* had little effect in restraining the writs issued against Scotchmen. Although it is to be observed that it was made imperative on plaintiffs in their affidavits to make reference to the amount of the claim, and the existence or non-existence of a local Court at the residence of defendants, so that the Judge's discretion might be exercised as to whether a writ should be issued, these supposed safeguards were apparently of no effect. The Judges, although English Judges were not believed by Scotchmen to be credulous, seem to have been satisfied of the truth of affidavits containing such mendacious assertions as that well-known Scotch county towns had no local Courts. The Judges seemingly were above knowing the existence of such petty Courts of Justice as Sheriff Courts, and accepted sworn lies as against notorious facts. A Parliamentary return was obtained, on Mr. Dick Peddie's motion, from which it appears that between March, 1877, and March, 1881, Scotch defendants were served with English writs in at least about 400 cases that would have required to be raised in Scotland, unless for the operation of the rules in question. Almost every conceivable kind of claim was embraced in these cases,—rent, damages for breach of contract, the price of goods sold, calls on shares, demurrage, damages for breach of charter-party, claims in

respect of work done, premiums of insurance, money due on bills, &c. As concisely put by a friend of mine, the evils and injustice of the system of the amended rules of Court with which I am at present dealing might have been summarised shortly thus: "(1.) As in each case it is a question for the discretion of the English Courts whether or not service on a Scotch defendant should be allowed, and as the circumstances of almost every case differ, there may be in all such cases, and there is frequently, a double litigation —one on the question of jurisdiction, and another on the merits of the case. (2.) The laws of England and Scotland still so widely differ in their rules of procedure applicable to such cases as arise between English and Scotch subjects of the Crown (*e.g.*, the rules as to the admission of evidence, the laws of prescription and of bankruptcy, &c.), that Scotch defendants, when a claim arises, must be frequently uncertain whether or not the claim can be enforced until it is decided if the English Courts are to exercise jurisdiction. They may know that the claim is bad in Scotland, and may yet be ignorant if the claim can be enforced in England. (3.) The present rules cause a violation of those recognised principles of international law, in a case where there is peculiarly little call for such a violation. In the case of foreign countries, there may be want of confidence in the tribunals of those countries, but there can be no excuse for that in regard to the Scotch Courts, which, as much as the English, are under the control of Parliament. It is confidently asserted that English plaintiffs will find that they can enforce their claims against Scotch defendants in Scotch Courts as quickly and more cheaply than in England." The expense of litigation in the Sheriff Court of Scotland is a mere trifle compared with the expense of litigation in the High Court of Justice in England; while the expenses of the Court of Session also contrast very favourably with those caused in the English Law Courts. I wish to supplement the summary of the injustice of the system under discussion by the following quotation from the Memorial signed by Messrs. Jameson and Burnet:—

"But in addition to the evils arising in consequence of service being granted upon *ex parte* affidavits, another source of injustice to Scotsmen is to be found in the manner in which the English Judges have exercised the powers given them by the rules in question; for, so far as the Memorialists can judge, the English Courts, instead of giving any weight to the maxim *actor sequitur forum rei*, lay down this as the rule from which they start in exercising their discretion to grant or refuse leave to serve out of the jurisdiction—viz., that it is the convenience of the English plaintiff, and not of the Scotch defendant, that is to be primarily considered, or at least that it lies on the Scotch defendant to show that there is a balance of convenience in favour of the case being tried in Scotland rather than in England. The Memorialists are aware that in the very recent case of *Mintons* v. *Hawley*, Lord Coleridge enunciated a rule different from this; but even in that case Lord-Justice Brett, and in the Court below Mr. Justice North, differed from Lord Coleridge, and there is no doubt that their dissent is in accordance with the previous practice of the English Judges.

"The result of all this is, that there appears to be almost no conceivable case arising out of a contract between a Scotsman on the one hand and an Englishman on the other, in which the English Courts will not give an order for service out of the jurisdiction; and that this is done in a manner not at all fair to Scotsmen seems to be a necessary inference from the fact that it makes no difference on which side of any given contract a Scotsman may be in any particular case.

"From the cases of Purchase and Sale in the Appendix, it will be seen that it matters not whether the Scotsman is buyer or seller—he must go to England to defend himself. From other cases it will be seen that whether a Scotsman is stockbroker or a stockbroker's client, he is liable to be summoned to London. It is the same whether he is the person chartering a ship or the person from whom the ship is chartered. Whether printing handkerchiefs in Glasgow or building a ship in Dumbarton, Greenock, or Campbeltown, or signing a promissory note in Leith, a Scotsman is alike liable to find himself dragged into the English Courts, and forced to litigate at an expense compared with which the costs in the Courts of his own country are trifling.

"In addition to the above general considerations, there may here be mentioned three particular hardships which are inflicted on Scotsmen by the exercise of the assumed jurisdiction by the

English Courts. (*a*) They are liable to be sued for petty sums in the Supreme Courts of England at relatively enormous cost, for which sums they could only competently be sued in their own country in the popular and inexpensive Small-Debt and Debts Recovery Courts. (*b*) The costs in the English Courts are exorbitant as compared with the costs even in the Supreme Courts of Scotland. As is well known, frequent complaint of the cost of litigation have recently been made by Englishmen themselves, and it is a great hardship that Scotsmen, who are perfectly satisfied with their own Courts, should be dragged into the English Courts and subjected to the risk of having to pay very serious costs. In connection with this it has been found that the practice of ordering service out of the jurisdiction has been made a frequent means of extortion, for where a small amount is involved Scotsmen often prefer to abandon a good defence rather than face even the extra-judicial costs incurred to their own solicitor in defending an action in the English Courts. The Memorialists would also direct special attention in connection with this point to Case V., where a trial at English Circuit Assizes was forced upon a Scotsman, and where he was practically compelled to settle the case in circumstances of great hardship. (*c*) By the operation of these Rules, Scotsmen are subjected to a system of law different in some important respects from their own. For instance, according to Scots law, all merchants' accounts prescribe in three years from the date of the last item in the account, and after that time the constitution and subsistence of the debt can only be established by the writing of the alleged debtor, or by a reference to his oath. In reliance on this rule of law it is the common practice in Scotland for traders and private individuals to preserve their discharged accounts or receipts for only three years. By the law of England, however (19 & 20 Vict. c. 97, sec. 9), there is no limitation of the right of action or the mode of proof with regard to merchants' accounts till after six years from their date; and supposing a person resident in Scotland to have paid an account to an English trader, and got it discharged in due form, but to have lost or destroyed the receipted account after keeping it carefully for more than three years but less than six, he would, if summoned before an English Court, be found liable in a second payment of the account, supposing the discharged account to be the only available evidence of payment. A single other example may be given, though such might probably be multiplied indefinitely. When a Scotsman sells goods he

expects either that they will be accepted and the price paid, or that they will be at once rejected. No action for damages for defective weight or quality discoverable upon unpacking would be entertained in a Scotch Court if the goods were kept. But it is now a frequent cause of complaint, especially from Dundee, that there has sprung up a system of keeping goods and suing the Scotch seller for damages in the English Courts with the object of obtaining a discount."

The memorial referred to contains a large number of illustrative cases, and in the original, from which I have made the above quotation, there is frequent reference to these, which are printed in an appendix to the memorial in question. The able memorials prepared and the representations made, had, no doubt, the result of inducing the modification of the above rules which was accorded last year. The views of the different Scotch memorialists all pointed in the direction of repeal of the objectionable supposed power exercised against Scotchmen, in virtue of the English Judicature Act, and a bill was introduced into Parliament with that object which, if I remember rightly, was withdrawn on some pledge being given by Government of a reconsideration of the question as to the expediency of modifying the rules. Whether this concession was obtained in consequence of the introduction of the bill referred to, or in consequence of the Lord Advocate's exertions, he having himself previously made representations on the subject, I am not aware. The result was that the Rules were still further modified.

Order xi., Rule 1, provides, *inter alia*, that—

"Service out of the jurisdiction of a writ of summons may be allowed by the Court or a Judge whenever—

"(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

"(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the juris-

diction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

And Rule 2 of the same order further provides that—

"Where leave is asked from the Court or a Judge to serve a writ under the last preceding rule in Scotland or in Ireland, if it shall appear to the Court or a Judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the Court or Judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriff Courts or Small-Debt Courts in Scotland, and of the Civil Bill Courts in Ireland respectively."

Of course I frankly admit that these rules necessarily, to a certain and very material extent, bar the persistent injustice and hardship which have been shown in the preceding pages to have emerged to Scotchmen through the operation of the English Judicature Act. In particular, had the words in subsection (*e*), "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland," been in the Rules of Court originally appended to the Judicature Act, the large majority of the actions complained of would never have been attempted to be raised in English Courts. The English legal bloodhounds have, however, acquired a taste for Scottish game, and the obstructions thrown in their way seem, in certain cases, merely to have whetted their appetite. Even yet cases are being raised on allegation that persons who are undoubtedly domiciled Scotchmen are something else. If once on the affidavits (which, as previously shown, Englishmen seem to emit as a matter of form, and with an utter disregard of what they are swearing to) a writ is issued by the English Court, it at once places a powerful *compulsitor*

in the hands of an unprincipled plaintiff or plaintiff's attorney to extort the settlement of a claim, however unjust it may be. Supposing a man is sued in Court on allegations which he knows cannot be proved, but have to go to a jury trial, and, supposing he knows his adversary is not worth powder and shot, it is consistent with the interests of his pocket to pay his adversary £50 rather than go to a jury trial which will cost him £150, and in which, although he knows he will be successful, he also knows he will not be able to recover a penny. This is one of the abuses for which it is difficult to find a remedy without possibly inflicting greater wrong; but, on something of the same principle, a Scotchman against whom an English writ is once issued knows, in certain cases, that it is wiser to pay something in the way of settlement of an unjust claim rather than enter on a contested litigation. It will cost a considerable sum of money to defend an action merely on the preliminary ground that there is no jurisdiction, and Scotchmen have no confidence that, in the matter of jurisdiction, the English Judge proceeds to try the question of whether the defendant is a domiciled Scotchman or ordinarily resident in Scotland with an unbiassed mind. He is inclined to believe that the English Judge is unduly impressed with the force of the Latin maxim, "Bonum est ampliare jurisdictionem." Since the issue of the modified rules, in the case of *Lenders* v. *Anderson* an English writ was served upon a Scotchman, and though the Court of Appeal recalled it, there emerged in that case, sufficient to keep in mind that in the matter of discretion as to issuing writs, there was room for English Judges to differ, and so, accordingly, still room for vexatious litigation against Scotchmen at the instance of Englishmen alleging themselves to be creditors. As an example of the extent to which English claimants (for in many cases it would be absurd to call them creditors) are still pursuing the old game, it may be noted that the case of *Lenders* v. *Anderson*, it was stated in Court, would rule at least twenty other actions. But in subsection (*f*) quoted above, it will, I think, be admitted,

there is scope for gross abuse even without the illustrative case which I am able to give. I thoroughly agree with a leading article which appeared in the *Scotsman* on 21st February last, on the case referred to, and here I may say that all Scotchmen, whatever their politics, ought to feel indebted to the *Scotsman* for the numerous and exceedingly able articles which have appeared in its columns from time to time, protesting against the English encroachments. In subsection (*f*) it will be observed that where an injunction (equivalent to an interdict) is in certain circumstances sought against a Scotchman, it may be coupled with an action of damages. The article in the *Scotsman* so clearly sets forth the nature of the case, and in my opinion the injustice of the assumed jurisdiction, that I take the liberty of extracting and reproducing a considerable portion of it here.

"An injunction was sought against a firm in Scotland to restrain them from infringing the plaintiff's patent in England, and damages for an infringement alleged to have been committed were also claimed. Now, where ought such an action naturally to be raised? If you wish to get damages from some one who has injured you, and to restrain him from doing so further, to what Court will you naturally resort? Why, to the Court which has jurisdiction over him and has power to interdict him from doing what you complain of, as well as to make him recompense you for the injury done. In other words, you would sue him in the Courts of his domicile; for they alone have power to enforce your demands against him. That is the ordinary rule of international law, and of every system of jurisprudence in the world except the English. True, you might protect yourself by interdict alone against any one within the jurisdiction of your own Court over whom that Court had jurisdiction, whether he acted on his own account or as agent of some one else without and beyond the jurisdiction. For the action of interdict is a personal action, and can only be directed against a person over whom the Court which grants the injunction has power. But you could not, according to international law, sue any one for damages in a Court to the jurisdiction of which he is not subject, and to the decrees of which he is not amenable. An Englishman, therefore, for example, who is damnified by the doings of a Scotchman in England ought to sue

him for a remedy in the Courts of Scotland—at any rate, if he seeks damages against him—though he might, perhaps, fairly enough seek to protect himself against those doings by an application in the English Courts against the Scotchman or his agent, if he could find either of them in England. What shall be said, however, if the wrong be done, as was alleged in the present case, without the presence of the wrong-doer? The act complained of was, that the Scottish defenders sold and sent to England certain articles which the plaintiff averred contravened his patent rights. These articles, called 'watch protectors,' were sent by post, and for all that appeared the Scotchmen never had been in England at all. In Scotland, presumably, the remedy in a similar set of circumstances would be to interdict the seller by an action in the Supreme or Sheriff Court. And so it was perfectly open to the plaintiff in this case to have restrained the receiver of the obnoxious articles from selling them to his prejudice in England. But he wanted more than that; and so he asked for damages as well, and obtained leave to serve a writ upon the defenders in Scotland, trusting, no doubt, to their settling with him, rather than appear in the English Courts to defend the action. Such a system is what we in Scotland have all along had to complain of since the English rules for service came into force here. Unfortunately, the rules, even as now altered, still seem to permit it. Order xi. 1 f. permits service out of the jurisdiction whenever 'any jurisdiction is sought as to anything to be done within the jurisdiction, . . .'—and accordingly the order for service upon the defendants, who reside and carry on business in Aberdeen, and have no place of business in England, was granted as a matter of course upon the plaintiff's application. It could not, indeed, fairly be said that the circumstances of the case fell within the terms of the rule which has been quoted; for all the defendants had done, was to sell goods to buyers in Liverpool; and what the plaintiff complained of, and sought interdict against, was the resale by these buyers in England, by which his trade was damaged. It would be absurd to suppose that the plaintiff's patent gave him the right to prevent any Englishman ordering a 'watch protector,' whatever that may be, to be sent him by post from Scotland for his own use. It is the wholesale procuring of these things from Scotland, and the consequent injury to his trade in England, that he is entitled to protect; and it would have been perfectly reasonable for him to prevent those purchasers in Liverpool from importing any more of these valuable commodities from the defendants, or at least from

selling them to his prejudice in England. The injunction he sought, however, against the defendants in Scotland was not 'as to anything to be done within the jurisdiction.' It could only act upon them where they are—namely, in Scotland—and therefore it did not fall within the terms of the rule fairly read and applied.

"But Order xi. goes on to prescribe, in Rule 2, that if it shall appear in such cases that there may be a concurrent remedy in Scotland, regard must be had by the Judge, who is asked for leave to serve a writ there, to the comparative cost and convenience of proceeding in England, or in the place of residence of the person sought to be served. Now, this provision was inserted in the rules for the express purposes of removing, if possible, the objections of Scotchmen to the new powers of service upon them. So early as 1876, soon after the rules came into operation, Lord Chancellor Cairns made this concession to the Scottish and Irish Members and others who then complained to him on the subject. And when, last year, the present Chancellor was reluctantly forced to modify the substance of the rules, this provision was retained as a further protection. Now Scotchmen have all along protested against the assumption by the English Judges of an initial jurisdiction in Scotland, upon which the rules and this provision rest. But they have been candid enough to admit that cases might occasionally occur which ought rather to be tried in England than in Scotland, and, unfortunately, they have allowed the English Judges to decide that point for them. Accordingly, the Judge, Mr. Justice Mathew, who was applied to in Chambers to discharge the order giving leave to serve in Scotland, seems to have had little difficulty in holding that the case ought to be tried in England, on the simple ground that the plaintiff's witnesses all resided there. Why his witnesses should be of more importance in the case or entitled to more consideration than the defendants' is not easy to see. The only reason that occurs to one is that they are English, and that English Judges act always in accordance with the maxim, 'It is the duty of a good Judge to extend his jurisdiction.' Mr. Justice Mathew evidently never applied his mind to the question whether or not there was a concurrent remedy in Scotland. He probably knew little enough about that, even if he had wished to consider it. For it was gravely stated to him, in argument for the plaintiff, that 'it was doubtful whether the Scottish Courts could grant injunction to restrain infringement of patent in England.' And 'even if the Court of Session could, the Sheriffs' or Small-Debt Courts could

not.' Judge and counsel seem alike to have been totally ignorant of the jurisdiction and powers of all our Courts, as these remarks show. The fact is, the plaintiff could have got for a few pounds from the Sheriff in Aberdeen, an interdict against the defenders there, restraining them from injuring him, in England or anywhere else, by the sale of his patent. The fact of their having sold goods in England could have been cheaply and readily proved by documentary evidence, probably without the necessity and expense even of bringing witnesses to Scotland. In fact, there was not a single element in the case which could justify the infringement of the ordinary rule of international law, that a defender must be sued in the Court of the country where he resides."

The case referred to is that of *Speckhard* v. *Campbell, Achnach & Co.* The pursuer, it appears, is a foreigner, without any place of business in the United Kingdom, and the defenders are india-rubber manufacturers in Glasgow and Aberdeen. The defenders appealed against Mr. Justice Mathew's judgment in the question of jurisdiction, and I observe that a Divisional Court of the Queen's Bench, presided over by Mr. Justice Day and Mr. Justice Smith, has adhered to the decision of Mr. Justice Mathews. As the *Times* of Saturday last says in an article, I quote *infra*, "This decision will not be regarded in Scotland with satisfaction."

Then again, as regards subsection (*g*), it is easy to see how, unless the Judge fairly complies with Rule 2 of Order xi., quoted above, gross injustice in different classes of cases might result. For instance, take the following case: Say there were altogether four defendants, three of whom were resident in Scotland, and one in England, and no valid reason why a distinction should be made in favour of England as to the *locus* of trial, still it is left to the English Judge's discretion to say whether the trial should be in England or Scotland. Now, we are not disposed to trust this vague abstraction of judicial discretion on the part of English Judges, with reference to the question of whether cases should go before the English or Scotch Courts, having regard to recent illustrations of how it is exercised.

What has just been said is, I think, sufficient to show that there is no security against injustice and hardship to Scotland, even under the amended rules. The question, however, does not seem to me to be alone one of security from oppression. *To permit the Amended Rules by unchallenged practice to be the law of the country will be to recognise the power of the English Judges to subject Scotchmen to a limited, it may be, but still to a definite extent to their jurisdiction.* It may or may not be the case that, in a true view of the law, the effect of the Judicature Act has been to confer the jurisdiction assumed by the English Judges in virtue of its provisions. But the question is one of principle. Earl Cairns, I submit, in stating that the question was not one of principle but one of degree, was wrong. To Scotchmen it is essentially a question of principle that a jurisdiction in violation of the Treaty of Union should be conferred on English Judges as against them. Surely, regarded in that serious aspect—as the question, I think, necessarily falls to be—it is not right that a new jurisdiction should be smuggled into the theory of the Constitution in the schedule of an Act of Parliament purporting to have reference to English Judicatories alone, and without a full and fair discussion on the direct and important issue.

It seems to me, therefore, that the patriotic and proper course to adopt is for Scotchmen to insist with no uncertain sound on the repeal of the provision, which, as regards Scotland, has been construed to confer the jurisdiction complained of. The Orr Ewing case will serve to intensify Scotch public feeling in the matter. It is true that it involves a different point of jurisdiction altogether ; but the category of cases, of which it is perhaps the most important, represents the aggression of the Chancery Court of England, and the issuing of writs complained of represents the aggression of the English Common Law Courts on the functions of our Scotch Courts. Therefore, practically both descriptions of aggression may be regarded under the common head of an attack by the English Courts upon the Scotch Courts, and both I think may fairly be

taken up and dealt with at the same time, if legislation be deemed to be the only fitting remedy, as I submit it is.

As to the Orr Ewing case, in view of the exposition of the law by the head of the Scotch Court and the other Judges of the First Division, I wish to put this question to those in authority: *Is it desirable in the interests of the nation that the judgment of the First Division should be allowed to be decided on appeal by the House of Lords?* Suppose the case does come up in the House of Lords, whatever the judgment of that august tribunal may be, it will be impossible to convince Scotchmen that the judgment of the great head of the Court and of Judges who universally and justly command the entire confidence of Scotchmen is not in accordance with Scotch law and international law. If, therefore, in consequence of the Chancery case the House of Lords should decide that the Orr Ewing estate is to be dragged away to England, it is not too much to say that the confidence of the people of Scotland will be shaken in the House of Lords as an appellate tribunal from the law courts of Scotland. Nay, more, it may even to a certain extent mar that feeling of confidence in the advantages of the Treaty of Union, which has been of great value to both nations. If, on the other hand, the House of Lords were to decide that the fund which they had previously decided was to be administered in England was also to be administered in Scotland, it might with considerable force be said that the members of that august tribunal were stultifying themselves. Neither alternative is desirable in view of public policy. Let the Government deal with the matter promptly. If looked at, not from

"The codeless myriad of precedent,"

but from the common sense of the English Members of the House of Commons, I entertain no doubt that the conclusion would be arrived at that, whatever the law might be, it was not desirable that the estate of a deceased domiciled Scotchman—the majority of the trustees of the deceased being Scotch—should be dragged away to England, in the teeth of Scotch law, because an infinitesimal

portion of the estate was in England at the date of death. I submit that an Act should be passed making it distinct that the administration of the estate of persons dying in the three kingdoms should be under the control of no other Courts than those of the domicile of the deceased; but that any estate situated in any of the three kingdoms other than that of the domicile of the deceased should be subject to the control of the Court of the country where situated for payment of any debts due by the deceased to its inhabitants at the date of death. That Englishmen may be trusted to deal with the matter, not from a *nisi prius* point of view, but fairly, is, I think, clear from the following article, which appeared in the *Times* of Saturday last (1st March):—

"Rarely does a decision in the Court of Session possess so much interest for Englishmen as that delivered at Edinburgh yesterday in the litigation respecting the estate of the late Mr. John Orr Ewing. The judgment of the First Division of the Court is another step in a conflict between English and Scotch Courts which might, in other times than the present, have grown into a grave difficulty, imperilling the harmony of the two countries. Scotchmen have of late felt themselves aggrieved at the supposed intrusion of English Courts into matters outside their province. Strong language has been used by a people not habitually addicted to it respecting the encroachments of English Judges. The Act of Union was said to be violated. Our Courts have been spoken of in much the same terms as some two centuries ago Presbyterians across the Tweed applied to our bishops. This feeling did not originate in the suits respecting the estate of the late Mr. Orr Ewing, but it has been much intensified by what has taken place in the course of administrating his property. Mr. Orr Ewing, a Glasgow merchant, died in 1878, leaving personal property to the value of more than £460,000. Of that sum, about £435,000 was in Scotland, and the rest was in England; and his will was proved in both countries. In 1880, an infant entitled to benefits under his will brought an action in the Chancery Division against the six executors and trustees. When the trial came on, Mr. Justice Manisty, believing that he had discretion in the matter, ordered the action to be stayed. He did so mainly on the ground that Mr. Orr Ewing was a Scotchman, and that the whole of the estate had, in fact, been transferred to Scotland. The Court of Appeal, however,

reversed this decision. The late Master of the Rolls had no doubts about the question. The plaintiff was entitled to be paid; three of the trustees were in England; and on these short grounds he held that the Chancery Division had as much jurisdiction over them as it would have here over Frenchmen in like circumstances. That opinion was fully confirmed by the House of Lords in a judgment given in December of last year to the effect that the plaintiff was entitled to have his share ascertained by the High Court, and that the Judge possessed no discretionary power to stay the action. A few days after the House of Lords had pronounced its decision, the question came before Lord Fraser in the Court of Session. The pursuers, or plaintiffs, who were beneficiaries under Mr. Orr Ewing's will, sought to have it declared that the estate ought to be solely administered in Scotch Courts. That view was adopted to its full extent by Lord Fraser. He directed the trustees that they must administer the estate according to Scotch law and under the authority of the Scotch Courts alone; that they were not at liberty to place the assets under the control of the Court of Chancery; and that they were not bound to render any account to that Court. He followed up his opinion by interdicting the trustees from removing any part of the property from the jurisdiction of the Scotch Courts. Lord Fraser has, both as a legal author and a Judge, a trenchant style, and in the 'note,' or opinion, accompanying his judgment, he did not hesitate to put the conflict which had arisen in the sharpest relief and most uncompromising terms, and to denounce as unsupported by the practice of any nation the claim made on behalf of the English Courts.

"What were the unlucky trustees to do in their troubles? Were they to obey the order of the Court of Chancery or that of the Court of Session? Must they choose between an English and a Scotch prison? Consulted on the matter, Mr. Justice Chitty directed the trustees to appeal against the judgment. They did so, and the First Division gave yesterday a decision which, while not removing the root of the difficulty, relieves the trustees from their embarrassment. The First Division declares that Lord Fraser is right, that the long practice of the Court of Chancery cannot affect the independent tribunals of Scotland, and that the estate must be administered under the eye of the Scotch Courts. In order, however, to get the trustees out of their troubles, it is ingeniously proposed to suspend their function and to substitute a judicial factor until such time as they can exercise their office without peril. Perhaps Mr. Justice Chitty will recommend the

trustees to take the opinion of the House of Lords, and that tribunal may, perhaps, say that the Lord President is in error. What is not beyond the range of possibilities is that it may declare that sitting as a Court of Appeal from the Chancery Division, it must hold that the trustees are to be punished if they do not administer here, and that, sitting as a Scotch Court of Appeal, it is bound to say that they must be punished if they do not do exactly the opposite. In any case, the matter must end unsatisfactorily. The trustees may go scathless; but the existence of conflicting jurisdictions is revealed. In determining what should be done we are not overawed by Lord Fraser's long array of foreign jurists pressed into service against the Chancery Division. It is generally possible to extract from Story, Savigny, or other eminent writers on international law, authority for any proposition which it is expedient to establish; if the requisite citation is not forthcoming, we may, as a rule, assume that the search has not been exhaustive. But the argument from expediency against the practice of the Chancery Division is strong. About seventeen-eighteenths of the property was situated in Scotland at the time of Mr. Orr Ewing's death, and all of it is now there. Four out of the six trustees are domiciled in that country; and it is admitted that proceedings in the English Courts would cause delay, and load the estate with needless expense. Indeed, to state, in its nakedness, the proposition that a creditor or beneficiary with a trifling interest may drag into an English Court a vast estate, all of which may be situated in Scotland, is to condemn such a condition of the law; and there ought, no doubt, to be a change, by legislation, if necessary, in the Chancery practice, so as to give our Courts discretion, and to prevent the probability of an unseemly conflict.

"There is all the more reason for taking some such step, seeing that Scotchmen have other grievances against our tribunals. Not only do they complain of the management of trust-estates being arbitrarily transferred, as in the case of the estate of the late Sir William Stirling-Maxwell, to London, but of the readiness with which process is issued from English Courts against Scotchmen in their own country. Matters are a little altered in this respect. The new rules of procedure impose important restrictions on service upon Scotchmen. Until the Judicature Act of 1875, no such power existed; a section of the Common Law Procedure Act of 1852 expressly excepted persons domiciled in Scotland from liability to be served with English writs. Matters

were altered by the Judicature Act of 1875; and, much to the dissatisfaction of Irishmen and Scotchmen, they were occasionally compelled to come to London at the suit of some creditor or plaintiff. So earnest were the remonstrances against this system that restrictions were imposed on the service of writs on persons ordinarily residing in Scotland; and the generally recognised maxim of law that a plaintiff is bound to sue a defendant in his own country, has been revived in some degree. But a grievance still exists. It will be seen from our Law Report that the Queen's Bench Division gave yesterday, in the case of *Speckhart* v. *Campbell & Co.*, a decision which will not be read in Scotland with satisfaction. In this action, which was against a Scotch firm for infringing an English patent, Mr. Justice Mathew allowed, at Chambers, service of a writ in that country, and the Court held yesterday that he was right. The decision will, no doubt, revive discontent, and it would be a pity to aggravate matters by reluctance to rectify the law as to the administration of trust-estates as expounded by the House of Lords. We see no reason why English Courts should seek to enlarge their jurisdiction in a way which vexes our Scotch fellow-subjects. Lord Fraser maintained that, both according to Scotch and international law, the Courts of the country where a testator is domiciled, and where the bulk of the property is situated, should regulate the administration of it; and we see no reason in good sense why that should not be recognised as the law here too."

As regards the form legislation should take with reference to stopping the issuing of writs by the English Law Courts, other than those which could competently be issued prior to the Judicature Act of 1875, the terms of the Bill previously referred to, brought into the House of Commons by Messrs. Anderson, Cochrane-Patrick, Buchanan, James Campbell, Bolton, Arthur Elliot, and Armitstead, seem to me well framed to meet the purpose desiderated. It runs as follows :—

"A BILL intituled 'An Act to regulate the Service of Writs of the High Court of Justice in England upon Persons in Scotland.'

"Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows :—

"I. Notwithstanding anything contained in the Supreme Court of Judicature Act, 1873, or the Supreme Court of Judicature Act, 1875, or in any Acts amending or affecting said Acts, or any Rules or Orders of Court passed or which may be passed under the authority of the said Acts, no service out of the jurisdiction or notice out of the jurisdiction of any writ of summons in any action for recovery of any debt, damages, or costs in the High Court of Justice in England shall, after the date of this Act, be ordered or allowed or be competent when the defendant in such action shall be resident in Scotland and have no dwelling-house or place of business in England.

"II. This Act shall not apply to any action which the High Court of Justice in England may have jurisdiction to entertain in respect of any ship, estate, or effects being attached within the jurisdiction of the said Court, or of any ship, estate, or effects being situated within the jurisdiction of the said Court.

"III. This Act may be cited for all purposes as the 'Service of Writs in Scotland Regulation Act, 1883.'"

I trust this or a similar Bill will be again pressed upon the Legislature, in conjunction with provisions such as those indicated above, to remedy the abuse of jurisdiction in the Orr Ewing case.

There is one word I wish to add in connection with a matter which has long seemed to me a blot on the Scotch system—viz., the extent of jurisdiction claimed by the Scotch Courts after an arrestment *ad fundandam jurisdictionem* has been laid. It is absurd that by attaching a man's walking-stick the Scotch Courts should claim to exercise full jurisdiction over the unfortunate possessor. It is fair enough that there should be jurisdiction to the extent of the value of the article or fund attached, but it should not extend further. No doubt the practice may be argued to be in accordance with international law, but it is surely obviously wrong. If the other questions of jurisdiction are to come up in Parliament, I think it will be well to include this subject also in the measure to be brought before the House.

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